John Robinson.

AN

ANALYSIS

OF THE

PRINCIPLES OF EQUITY PLEADING;

CONTAINING

A COMPENDIUM

OF THE

Practice of the High Court of Chancery,

AND THE

FOUNDATION OF ITS RULES.

TOGETHER WITH

AN ILLUSTRATION OF THE ANALOGY

BETWEEN

PLEADINGS AT COMMON LAW AND IN EQUITY,

By D. G. LUBÉ, Esq. of Lincoln's Inn,
BARRISTER AT LAW.

Τὰ κοινὰ καινῶς

"Colligere tantum eadem, et disponere paulo significantius conor."
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To A. R. BLAKE, Esq.

MY DEAR SIR,

It gives me great pleasure to have an opportunity of testifying my sense of the kindness I experienced, as well as the Instruction I derived from you, as one of your Pupils;—and I inscribe to you the following Sheets.

I remain, my dear Sir,

Your faithful and obliged Friend,

D. G. LUBÉ.

PREFACE.

It has long been a subject of reproach, that the study of the Law has degenerated from a liberal and scientific pursuit, into a mere mechanical process of acquiring forms by dint of manual labour at the desk. How far this general censure on the Profession may be just, we will not now stop to enquire; but thus much we may be permitted to observe, that they who would confine the education of a Lawyer to mere books, without affording the student the advantages to be derived from the practice of an office; and those who, on the other hand, recommend to have the pupil immersed in all the details of business, without a previous competent knowledge of the theory, would equally pursue a system erroneous and unprofitable.

Precision of language is so essential to law proceedings, that the change, or omission of a word, frequently frustrates the object in view: and hence has arisen the custom of adhering to such forms, as experience has determined to be adequate. Without settled forms, the most extensive and profound acquaintance with the theory could not secure the practiser against overlooking, in the hurry of business, some point, or perhaps some phrase, important to his case (*a*). No general course of reading will ever suffice to draw the attention to these minute, but necessary points; the knowledge of which can be derived from practice alone, in the office of some experienced guide; who, in rectifying the errors, and supplying the omissions of the pupil's first efforts, can at the same time inform him of the reasons and rules of law, which suggest the propriety of the alteration. This at once serves as an illustration of the Theory of the Law, and impresses its maxims on the memory: and

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(*a*) "*Nihil simul inventum est, et perfectum.*" Co. Litt. 230. a.

thus the pupil gradually increases in confidence, until he feels himself competent to enter the lists of the Profession, and perform his duty to his client with facility and dispatch.

On the other hand, to plunge the student at once into all the servile drudgery of copying precedents, and literally adhering to forms, the origin and meaning of which is seldom comprehended, and frequently never investigated, is to begin at the wrong end; and is certainly liable to all the animadversions cast upon that illiberal mode of education, which degrades one of the noblest and most useful sciences into a narrow and insignificant art; and which has given occasion to all the obloquy, from time to time heaped on a profession, thus requiring a very ordinary degree of capacity in the acquisition. A man, so trained, may be an expert mechanic, but never can be a sound lawyer. Besides, a system of this kind enfeebles and contracts the mind, by binding it down to a timid and obsequious subservience to the very syllable and letter of the form, from which it durst

not deviate, because ignorant of its utility and effect. Hence the worse than useless prolixity of deeds, and other law writings, and the accumulation of unnecessary phraseology, every where to be met with in the written proceedings. The student, who has gone through an ordeal of this kind, previous to his admission to the bar, comes out the "*leguleius cautus atque acutus auceps syllabarum cantor formularum.*" But such a process of initiation is abhorrent to the mind imbued with the taste of classic literature, and fresh from the spring of genuine science. The study of the law, however, when properly pursued, is perfectly congenial to the most enlightened intellect, connected as it is with ethics, legislation, and rhetoric.

If, as Mr. Locke has affirmed, morality be capable of demonstration, *a fortiori* are the propositions of law, the terms of which are precise and well defined, susceptible of proof. The laws of our country, in fact, form a connected and well digested system of mutually dependant rules, even to its minutest ramifications: and those

propositions, which, when isolated, appear arbitrary, and sometimes even attended with hardship, if traced to their source, will be discovered as necessarily flowing from some fixed and just principle of legislation. On this principle, the following pages attempt to pursue the course of the subject under investigation, up to its fountain-head, rather than track the several channels of its divergence; their design is more to point out the origin and '*rationale*' of the rule, than to hunt after the shades of difference in its application; "*potius fontes expetere quam sectari rivulos.*" By this process of analytical research, the student will sometimes be surprised to find himself landed on a conclusion, by necessary inference, which he may elsewhere meet with as an unsupported dictum, or resting only on the authority of decision. Indeed, it seems to be the prevalent fault of our law tracts, that they heap together a multitude of independent rules, for the accuracy of which they are contented to refer to the cases where they occur, without ever once adverting to the grounds of their adoption; and the work is esteemed in

proportion to the diligence with which cases are collected, and to the number of references in the margin. This may be abundantly useful, as the plan of a work of consultation, for the benefit of such as are satisfied with point-learning; but cannot be advantageous as an elementary treatise. On the contrary, the attention is distracted, and the intellect wearied, by the infinity of minute distinctions; and it requires the most patient industry, and indefatigable zeal, to draw any general conclusion from a multitude of apparently contradictory authorities.

A treatise intended for instruction should do little more than sketch an outline of first principles, carefully discriminating between those propositions which are essential to the understanding of the subject, and those superfluous corollaries, which only create embarrassment. The student thus conversant with the elements of his science, will be able to reason '*a priori*' upon every new case that is presented to him, instead of being obliged to have recourse to analogy, which is oftentimes a

fallacious, and at best, a laborious test; he will have less occasion to depend on the exercise of his memory; and at every step that he advances, he will find order and harmony throughout the whole progress of his acquirement. Even the monotonous routine of the office, in place of a mindless task of copying forms, is raised by him to intellectual dignity; and he finds, even in that employment, a new and beautiful application of foregone knowledge to present practice.

With this object in view, various books have been written to assist the student both in conveyancing and special pleading; but nothing of the same kind seems to have been attempted in equity drafting; partly from the notion that there is less nicety required in equity pleadings, which are not so liable to be vitiated by verbal flaws, or errors of form; and partly, perhaps, from an idea that there can be no systematic arrangement of the subject; an opinion that is countenanced by the latitude of indulgence prevalent in equity, and its apparent deviations from the technical sub-

tleties of common law. But that this is a mistake arising from want of sufficient attention to the forms of pleading in equity will, it is imagined, be apparent from a perusal of the following sheets. We have endeavoured to reduce the pleadings in equity into a scientific method, to shew their analogy to the pleadings at common law, and of both to the principles of dialectics. Hitherto the pupil has been left without any other guide than a few imperfect precedents, and the scanty observations that are to be found scattered among books of practice; added to which, he had to struggle against a very faulty enumeration of the parts of a bill, calculated only to mislead and perplex him. The deficiency in this particular has long been sensibly experienced, and the following analysis is an attempt to supply the desideratum.

As the original design was principally for the instruction of pupils, the author thought it right to prefix an epitome of the practice; which, however, from his anxiety not to omit anything which might be of utility, has gradually been raised into an im-

portant portion of the work. He trusts, at the same time, that this part of the performance will not be found superfluous; as, not satisfied with seeing that '*ita lex scripta est*,' he has endeavoured throughout to discover the origin and reason of the rule. This attempt is, for the most part, entirely new; and so far as he has been enabled to succeed, is elucidatory of many points, which otherwise appeared confused and irrelevant. He has carefully abstained from encumbering the memory with any disjointed matter, while he has been diligent not to overlook anything material to a just apprehension of the subject, being desirous of making it a useful as well as convenient compendium. In this point of view, solicitors who wish to acquire a knowledge of the principles of practice, will find it advantageous; at the same time that it is sufficiently copious for the purposes of general reference.

The method adopted in this treatise is as follows:—

1st, The general nature and subjects of the jurisdiction of equity analytically deduced.

2nd. The objects and end of *suits*, whether at law or in equity, and the resolution of them into their component parts.

3rd. Of a suit in equity in particular, containing a compendium of the practice, from the filing of the bill to the final decree, together with the incidental proceedings.

4th. An analytical treatise of pleading in general, shewing the analogy between pleadings in equity and those at common law, when traced to first principles, with a scientific arrangement, which will be found equally useful to common law students.

5th. Instructions for drawing each of the pleadings in equity in their order, with some general rules and observations.

6th, And lastly, to the whole is added an Appendix of useful common forms.

The author ventures to hope, that a previous acquaintance with the present work would materially abridge both the labour

and duration of the pupil's service in the equity draftsman's office; and as such he recommends it to those young friends who are destined for that branch of the profession. He also suggests the propriety of not hastening too cursorily over the subject, as many parts of it may appear at first somewhat difficult and abstruse. The pupil should advance cautiously, secure of understanding previous points, before he presses on to their deducibles; and proceed always '*a notioribus ad minus nota.*' With this advice the author takes his leave; concluding with the exhortation of Cicero to his friends—"*Quamobrem pergite, ut facitis, adolescentes; atque in id studium, in quo estis, incumbite, ut et vobis honori, et amicis utilitati, et reipublicæ emolumento esse possitis* (*b*)."

(*b*) Cic. de Oratore, Lib. 1.

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ANALYSIS

OF THE

Principles of Equity Pleading.

CHAPTER I.

OF THE NATURE AND SUBJECTS OF THE JURISDICTION OF EQUITY.

THE Practice of Equity Drafting consists in drawing the various pleadings which occur in the course of a suit in Chancery in a technical form, and with apt and proper words, so as to assert the claims, or to defend the rights of the several parties concerned.

The design of the present treatise being to assist the pupil at his first entrance into the pleader's office, in acquiring and comprehending the method which long practice has settled of drawing these pleadings, our business is principally with the manner and form :—for the matter and substance, and the system of rules deduced therefrom, we must refer the student to the various digests and works on Equity. For the

better understanding, however, of this part of the subject, it will be necessary to have previously a general idea of the nature and subjects of the jurisdiction of equity: next, we shall take a brief review of the progress of a suit in the Court of Chancery, in order to trace the several pleadings, from the bill to the final decree; and herein we shall consider the parties complainant and defendant: lastly, we shall examine the frame and structure of each pleading separately, and as it arises.

Law is founded on relations; for these necessarily produce reciprocal duties, which it is the end of law to enforce; and the subtraction of any of these duties is an injury, for which the law professes to provide a remedy. Thus the relative situation of magistrate and people begets the duties of protection and allegiance. So of the relations of parent and child, husband and wife, master and servant, neighhour and neighbour, &c. But by far the most numerous class has arisen from the right of acquiring and transmitting property, as the relations between landlord and tenant, mortgagor and mortgagee, *cestui que trust* and trustee, executor and legatee, and the other various positions in which persons stand with respect to each other, who have either an immediate or derivative interest in the same matter of property. And it is not without reason, that the

attention of the student is called to this point; because the process which the mind should use in all cases of law is, first, to have a clear and accurate view of the nature of the relation subsisting between the parties; next, to consider the duties which flow from it; thirdly, to have in mind the breach of what duty has constituted the injury complained of; and, lastly, to seek for the remedy which the constitutions of the country provide, and the manner of enforcing it.

Now as refinement and commerce have introduced a great variety of complex relations, which could not have been originally contemplated, it follows that many duties springing from these new situations exist, the performance of which cannot be enforced by the ancient and common law; either because it gives no relief, or that in the administration of the remedy, it is rendered ineffectual by the strictness of its rules. At this point therefore Equity interposes, and assumes a jurisdiction to prevent the ends of justice from being frustrated.

From what has been said above, it is obvious that the jurisdiction of equity results from the inadequacy of ordinary courts of justice to afford relief in *particular cases*; and hence we arrive at a general view of its nature and extent, such *particular cases* being within the peculiar province

of equity. Again, if we consider wherein the deficiency in the courts of common law consists, we shall obtain a still nearer view, and be enabled to classify the *particular cases* cognizable in Chancery under distinct heads. As has been already stated, the defect of common law courts is twofold:—either, First, where there is no remedy provided; or, second, where it is rendered inapplicable, and cannot be obtained by the ordinary rules. Again, this deficiency may arise in either of three ways:—First, from the method of proof used by the ordinary courts; second, their mode of trial; or, lastly, the measure of relief afforded by them.

As to the first, namely, the method of proof used by the ordinary courts. At common law, the plaintiff is compelled to make out the whole of his case satisfactorily, either by written documents, or by the testimony of *indifferent* persons upon oath. But cases frequently occur where the plaintiff, though having the right, must be defeated at law, either because material documents have been lost, or that the facts necessary to substantiate his case are known only to the parties interested in the suit. Under these circumstances, a court of equity comes to his aid, and corrects the deficiency by obliging the defendants to make a *discovery upon oath*, which, as the student will see by and bye, when we come

to treat of Answers, is the usual proceeding of this court. To this head therefore we are to refer the *first class of particular cases* cognizable in equity; and they are either, first, matters of account; such as the administration of personal assets, tithes, partnership transactions, mercantile accounts, and those of bailiffs, receivers, agents, factors, &c. &c.: or, secondly, frauds; under which title we range all matters binding in conscience, lying within the private knowledge of the parties, judgments obtained by fraud and concealment, &c. The student will observe, that in all the cases here enumerated, equity only exercises a concurrent jurisdiction with the courts of common law, the remedy being there defined, but rendered abortive by the inadequacy of the process for obtaining it; and any matter by these means once coming within its cognizance, it goes on to decree relief, in order to avoid the expense and delay of litigation in two separate courts; with the exception of those cases where discovery is sought expressly in aid of an action at law already commenced.

Secondly: As to the deficiency in the mode of trial at common law.—In the ordinary courts, all the witnesses are examined *viva voce:* in this court their depositions are taken in writing, of which we shall speak more at large when we

come to the title Interrogatories. Wherever therefore, from the nature of the case, the witnesses cannot in civil causes be examined *viva voce,* Chancery assumes a jurisdiction in aid of the other courts; and this constitutes the *second class* of *particular cases.*

Thirdly and lastly: Where the measure of relief provided by the other courts of judicature is inadequate to fulfil the ends of justice, equity interposes and gives a specific remedy; and the class of cases which comes within this head constitutes the *third series* of *particular cases* cognizable in equity. These are, amongst others, the specific performance of executory agreements; the immediate prevention of waste or other irreparable injuries; the restraint of endless litigation; setting aside fraudulent deeds; decreeing reconveyances; directing absolute conveyances to stand as securities only; decreeing a sale of lands, to discharge incumbrances, debts, &c.; and lastly, the construction of real and personal securities as mortgages, bonds, &c., and the execution of trusts.

Besides the cases above enumerated, the Lord Chancellor is entrusted, *virtute officii,* with, First, the guardianship of minors. Secondly, the custody of lunatics, and ideots. Thirdly, the care and superintendance of charities. And fourthly,

the management of bankruptcy cases. These together include all the matters which can be the subject of a bill in Chancery; and the student will do well to consider to which of the above classes the matter which he has in hand is reducible, as thereby he will have a more distinct perception of the scope and object of the bill to be drawn, whether it be for a discovery from the defendant, for the examination of witnesses, or for a specific remedy; or lastly, for all or some of these purposes combined. We have omitted saying any thing here of the ordinary jurisdiction of the court of Chancery, as our business is solely with pleadings in *Equity* (*a*).

It is obvious, from this general outline of the jurisdiction of Equity, that the pupil should be previously acquainted with the form and extent of the remedies supplied in ordinary cases by the common law, in order that he may know where the province of equity commences.

(*a*) Vide Black. Comm. Vol. 3, c. 27, from which the above analytical arrangement has been chiefly taken.

CHAPTER II.

OF SUITS IN GENERAL.

A SUIT is the form of application to the judicial power of the state, for the redress of injuries alledged to be sustained. It seeks, in the first instance, the judgment of the law on a matter of right in dispute between the parties. The right being ascertained, it in the next place demands the interference of the supreme authority, or sovereign power, to put the injured party in possession of his right, or to enforce compensation in lieu. The subject matter therefore of all suits, is the rights of the individuals concerned; and the end, is the judgment and sanction of the law.

A suit consists of the *Process*, the *Pleadings*, the *Proofs*, the *Trial*, *Judgment*, and *Execution*; to which may be added, the incidental or *interlocutory* proceedings which may arise during its progress.

The *Process* is the means by which the party complained against is brought into court, to answer to the matters laid to his charge.

The *Pleadings* are the allegations and answers of the respective parties, which are carried on until the true and simple point of dispute (whether matter of right or matter of fact) is extracted; being an assertion on one side, met by a denial on the other, from which follows the appeal to the proper tribunal.

The *Proofs* are the evidences in support of the question of fact.

The *Trial* is the mode of determining the question of fact.

The *Judgment* is the deduction of law drawn from the pleadings, as admitted to be true by the adverse party, or established by proof.

Execution is the sanction of the law, enforced by its ministerial officers, who thus give effect to the judgment pronounced.

From what is said above it may be collected, that the judicial authority is an emanation from the sovereignty, wheresoever that resides; and hence, with us the courts of judicature are called the King's Courts; and all original writs which give them jurisdiction, are teste'd in the king's name. In reality, the original of all government, and therefore the first duty of that established in any country, no matter of what form,

is the protection of the weak against the violence of the strong (*a*). On this account the demand of justice is always made to the supreme power, whose principal office is to redress injuries, and punish crimes. In despotic governments the prince usually, at least in the early stages of civilization, administers justice in person; and as he is guided by no law, it is generally dispensed in a summary way, according to his discretion or caprice (*b*). It next naturally follows, that finding this both a troublesome and invidious office, he delegates his power into other hands; and thus judges are appointed early in the progress of civilization: and although at first they are possessed of the same arbitrary authority which they have derived from the prince, yet it is checked and restrained by the power of appeal to the sovereign himself. It is from this that liberty takes its first rise, being nursed and protected in the "*cunabula legis.*" If it happen that a just and wise man be chosen to fulfil this important trust, his decisions are regarded as laws, and followed as precedents from which it would be dangerous for his successors to depart; and thus is another restraint

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(*a*) Officium erat imperare, non regnum —Sen Epist. 91

(*b*) Populus nullis legibus tenebatur arbitria principum pro legibus erant —Justin Hist Lib. 1

imposed upon the arbitrary power of the judge: and in this manner liberty makes one step further in advance.

This is the natural order of things. Laws at first generally arise *pro re natâ*, and it is only by degrees that they become established into a permanent rule of conduct. Until such, however, takes place, there can be no perfect security. Courts of justice are the immediate consequence of established laws, for these are erected to decide controversies according to the *declared rules of law*, and to administer the appropriate *remedy provided* for the particular case. This view points out a division of the laws into two great branches; the one declarative of abstract rights; the other, of the practical form, and mode of redress. The perfection of law is to have a clear and definite remedy for every injury which can be sustained, *nullus recedat a curia sine remedio*; and it is at this flourishing period of civil polity, when the laws are fixed, and property secure, that we are now enquiring into the method employed for obtaining and applying the remedy.

The mode of obtaining the remedy is by *suit*, and for the sake of regularity, every court lays down a system of rules and proceedings, called the *practice* of the court; the knowledge of which forms a very considerable branch of the

study of the law. The practice of the court of Chancery will be the subject of the whole of the first part of this treatise. At present we confine ourselves to a general consideration of those proceedings which are essential to every suit, and therefore common to all courts. As for the sake of justice every thing must be well weighed and considered before the court will pronounce a definitive opinion upon the rights of the parties, both parties must be heard, and the court must know what the person complained against has to say in his own behalf, before the executive functions of the court will be exercised against him. The first step, therefore, upon complaint being made, is to procure the attendance of the wrong-doer, in order that he may justify or deny the conduct attributed to him, and that he may shew to the court some reason, if he can, why he should not be compelled to make the restitution demanded. The summons to attend, or the compulsory means resorted to when the party will not appear voluntarily, is denominated the process of the court, and is part of the ministerial power entrusted to it, and subservient to its directions. When the parties are before the court, the injured person states his complaint, and the other answers and excuses himself; to which the former replies; and so on until the altercation arrives at a point, where one party denies the *right* claimed, or the *fact* insisted upon by the

other side, from which arises the appeal to the court for its decision. These disputations are what are called the *pleadings* in a suit, which are with us carried on in writing, though formerly delivered *ore tenus* at the bar, and noted down by the prothonotaries, to avoid evasion and a shifting of ground, which is termed a *departure.* Thus the appeal to the court is either on a question of right, or a matter of fact, or both. Where laws have been established declarative of abstract rights, the first point must be decided according to the rule of law (*c*). If there be no law or custom prevailing which meets the case, then the decision must be left *arbitrio boni viri,* who determines the controversy according to reason and conscience, and the dictates of natural justice. This is the meaning of equity, as distinguished from law, whether it be administered by the same, or a separate tribunal. When the dispute turns upon some point of fact, the truth or falsehood of the fact must be ascertained by *proof.* The only rational mode of proof is, by the testimony of witnesses, and documentary

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(c) The decision of the judge upon a mere abstract right or point of law, which is the same as our judgment on demurrer, was called by the Romans, *jus dicere,* to distinguish it from the final sentence, which was *judicare. Vide P. Manut. de Legibus.* 826.

evidence, or by putting the accused party's conscience to the test of an oath. Of these, the last is the weakest, and therefore it is seldom used alone. The trial is the manner of weighing and examining the evidence, so as to elicit the truth: thus, witnesses may be examined *vivâ voce*, or their testimony may be delivered in written depositions: so the same persons may be the judges both of the law and the fact; or there may be different tribunals for each of these questions, as in our common law courts, the judges decide questions of law, the jury matters of fact. After the rights of the suitors have been ascertained, and the facts proved and established by trial, next follows the solemn *judgment* of the law, which is an adjudication of the remedy prescribed for the particular injury sustained. But if the existing laws have not provided suitable redress, then again equity assumes the authority, and affords relief, according to the circumstances of the case. If, either on the determination of the question of right or of fact, it appears that there is no just cause of complaint, then the judgment is in favour of the party accused, and he is allowed to depart without further molestation. Lastly, comes the execution of the sentence of the court, being the end for which all suits are instituted; by which the remedy dictated by the court, or provided by

the laws, is enforced, under the authority of the supreme power of the state; and this is the final sanction, without which, laws, however just and salutary in their enactments, would yet be unavailing and inoperative. In the progress of a suit, it may become necessary for the court to give various directions connected with the proceedings before it. These are the interlocutory orders, which however determine no right between the parties, but are merely subservient to the due administration of justice, and subordinate to the final judgment. Such orders are therefore merely discretionary, being granted according to circumstances, upon the application of the parties, though in some instances grown, by frequency and custom, into matters of course. But this is part of the learning of the practice of the courts.

These incidents, and these observations, are alike applicable to all suits, in all countries, and at all times; for, however dissimilar the forms of proceeding in each may be, yet they are all built upon the same foundation, and constructed on the same plan. The materials, and the style of architecture, may be different, but the design of the edifice is in all cases the same.

In illustration of this remark, it will be cu-

rious, and not perhaps altogether unuseful, to trace the affinity between the proceedings in civil causes under the old Roman Law, and that which prevails in this country (*d*). The Prætor Urbanus was the judge who presided in the court, and who decided on the pleadings and matters of law arising out of them, as our demurrers are argued before the court. The *actor*, or plaintiff, first proceeded *in jus reum vocare*, equivalent to the original writ with us, and the process founded thereon; for if the *reus* or defendant, disobeyed the summons, he was dragged to justice *obtorto collo*. The next step was *edere actionem*, similar to filing a declaration; and then came the *postulatio actionis*, analogous to a day being given to the parties. If necessary, the plaintiff *vadabatur reum*, like our bail above. Bail was also given below, according to the common maxim, *In jus vocatus aut eat, aut satisdet*. At this stage the controversy was frequently terminated, either *transactione*, like our judgment of *nonpros*; or *pacto*, which resembled our imparlance. If on the

(*d*) *Vide Sigon. de Judiciis.* See also what is said by Sir William Jones on this subject, in his prefatory discourse to the Speeches of Isæus; and the analogy which he there draws between the Athenian and the Civil Law.

day appointed, both parties appeared, they termed it, *se stetisse;* if not, judgment went by default. A similar rule holds with us, if the parties neglect to plead in time, which is equivalent to non-appearance at the day given; for anciently, as has been already remarked, our pleadings were delivered *ore tenus* in court, and it is so entered on the record-roll at this day. When the parties pleaded, they were said *litem intendere*, which was performed in a set form of words, varying according to the nature of the action, and concluding with a prayer of judgment, which was to be allowed *judices*, or *centumviri*, to hear and decide the controversy. So the argument of our pleadings is carried on before the court, and the conclusion, or *issue*, if on a matter of fact, is to the country. *i. e.* to be allowed twelve good and lawful men as judges, to try the issue according to the evidence. In the Roman law, as with us, the *centumviri*, or jury, always took a solemn oath to be impartial. They were chosen three out of each tribe, so that their number amounted to five more than their name imported. When the *judices* were awarded by the court, then commenced the *disceptatio causæ* before them, managed by the lawyers on both sides, similar to the trial at *nisi prius*. The lawyers who conducted the business were of two classes, *procuratores* and

advocati, analogous to attornies and barristers with us. These had not permission to practise until their names were entered in the matriculation book of the *forum*, a custom perfectly consonant to the formality of being called to the bar, after a certain service in one of the inns of court, which is equivalent to matriculation. Nor were they allowed to plead in a particular cause, unless retained by one of the parties, on receiving a fee, called *mandatum*. The analogy in this respect to our retainer, will be immediately recognized. In like manner the Romans had a proceeding, termed *in integrum restitutio*, equivalent to a new trial; *addictio*, which was the same as our *ca. sa*; *judicium calumniæ*, like our costs *pro falso clamore*. In some cases the *estimatio litis*, or damages, and *judicium falsi*, similar to our ancient, and now obsolete method, of proceeding against the jury by attaint.

It was not however until after the code of Roman laws had gained a high degree of excellence, that these forms of judicial proceedings were arranged and defined. In the rude and early period of the Roman commonwealth, after the expulsion of the kings, and the consequent abrogation of the *jus Papirianum*, the judicial proceedings rested wholly on the discretion and authority of the consuls, and other chief ma-

gistrates (*e*). The inconvenience of this system was soon felt, and commissioners were sent into Greece, to make a collection of the best laws for the service of their country; from which were compiled the Laws of the Twelve Tables, on which Cicero passes so high an encomium in his first book *de Oratore* (*f*). On these were founded numerous commentaries and interpretations, the whole body of which, taken together, formed the *jus civile*, or what may fairly enough be termed, the *common law*. The necessity of establishing settled forms of proceeding next produced the system of rules, called *actiones legis*, or the laws and regulations relating to the practice of the courts. But even so late as the time of Sylla the Dictator, these were still subject to continual fluctuations; for the Prætors, at their entrance into office, always issued an edict, modelling the practice according to their discretion, during the time they presided in the court, until the *Lex Cornelia* ordained that the same form should always be used in judicial proceedings, in order

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(*e*) Initio civitatis Romanæ populus sine certa lege, sine certo jure, agere instituit; omniaque manu regis gubernabantur. *Pomp. de Orig. Jur.* l. 2.

(*f*) Fremant, omnes licet, dicam quod sentio: bibliothecas mehercule omnium philosophorum unus mihi videtur xii tabularum libellus, si quis legum fontes et capita viderit, et auctoritatis pondere, et utilitatis ubertate superare. *Cic. de Oratori, lib.* 1

to preserve a constant and regular course of justice. These laws were from time to time encreased, as occasion demanded, by the *senatus consulta* and *plebiscita*, which bear an analogy to our statute law: added to which were the edicts of the prætors, called the *jus honorarium*, similar to those decisions of eminent judges, which are with us acknowledged as precedents, and have obtained the force of laws. Lastly, when the government of Rome became despotic under the Cæsars, the will of the prince, or, as it was impiously termed, *jussio divina*, had the authority of law, with the name of *principalis constitutio*. Happily for us, we have no parallel for this in our political institutions (*g*). In the reign of the Emperor Justinian, these laws, and the writings upon them, had grown to such an enormous bulk, that there were then extant two thousand distinct volumes on the subject. They were, by his orders, revised and reduced to the four celebrated volumes which go under his name.

The brief sketch which we have thus attempted to give, of the rise and progress of the Roman system of jurisprudence, is with a view to illustrate the observations which have been

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(*g*) The doctrine of the *divine right* of legitimacy has not yet found its way into this country.

made in the early part of this chapter (*h*). We shall now proceed to give a detailed account of the nature of a suit to the *extraordinary* jurisdiction of the High Court of Chancery in England.

(*h*) For further illustration on this point, we refer the curious student to Selden's Janus Anglorum, where he will find the origin of our customs traced to their source, and some account of the laws and religion of the ancient Druids.

CHAPTER III.

THE COMMENCEMENT OF A SUIT IN CHANCERY.

SECT. I.

Of the Nature and several Kinds of Bill—and of the Parties thereto.

A SUIT in Chancery is commenced by the party aggrieved preferring a petition in writing, which is called a Bill, to the person or persons for the time being having the custody of the great seals of Great Britain; or to the king, in his High Court of Chancery, in case the person holding the seals is a party, or the seals are in the king's hands.

The petitioner, who technically styles himself "your orator," first sets forth in his bill the nature of the relation subsisting between him and the party defendant, therein deducing his own title. He next states the injury complained of; adding such circumstances, by way of allega-

tion, (in pleading, termed 'charges,') as tend to corroborate his statement, or anticipate and controvert the claims, or pretended claims, of his adversary: and finally prays the court to grant a writ of *subpœna*, to compel the defendant to appear and answer the several positions of the bill (which are put into the shape of distinct interrogatories), in order that the court may be enabled to decree such relief as the nature of the case may require; and which relief is also specifically prayed for. If the injury complained of be immediate, and of such a nature as that it would become irremediable by delay, the petitioner, besides the writ of *subpœna*, applies for such other writ or writs as may meet the exigency of his case—such as the writ of *injunction*, or *ne exeat regno*.

All bills are *bills of discovery*, as appears from what has been said concerning the nature of them generally: but some are peculiarly termed such, which do not seek any decree from the court, but require its aid only in support of an action at law, or to perpetuate the testimony of witnesses, upon a matter which might thereafter be the subject of dispute. If any new matter has arisen subsequent to the filing of the bill, whereby the original suit becomes defective, and no regular decree can be made, a new bill, containing the supplemental matter, and reciting the former bill, must be filed, and is denominated

a *supplemental bill.* If the supplemental matter be such as would cause an abatement of the suit, as the death or change of interest of any of the principal parties, the new bill is styled *a bill of revivor*, and must state upon whom the interest has devolved, and pray that the suit may be revived, and stand in the same plight and condition with respect to the new party as before the abatement occurred. In some instances the new bill will have the double character both of revivor and supplement (*a*). *The bill of interpleader* is exhibited by one who owes a debt, or duty, claimed by different persons in separate and distinct interests; that the parties claiming may interplead together, so that the court may pronounce to whom the thing claimed belongs, and the person filing the bill may be safe in the payment thereof. To this bill an affidavit is always annexed, that the complainant does not collude with either of the parties (*b*). A *cross bill* which is one filed on the part of the defendant, will be noticed further on; as will also the *bill of review.*

In general, all bodies politic or corporate may exhibit by themselves a bill in this court, except *infants*, *feme coverts*, and *ideots* or *lunatics.* When an *infant* claims a right, or suffers

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(*a*) See further as to these bills, *post*, Part I. cap. 16.

(*b*) *Vide post*, cap. 9, sect. 2.

an injury, on account of which it is necessary to resort to the jurisdiction of Chancery, the court will permit any person, *without the infant's consent*, to institute a suit in his behalf; and such person being generally the nearest relation, or individual most interested for him, is entitled the *prochein ami* (*a*); but he is liable to costs of suit, if determined against him (*b*). And if an infant be sued, the Court will appoint a guardian '*ad litem*.'

A *feme covert* must sue, and be sued, jointly with her husband, unless she claims a right in opposition to him; in which case her *prochein ami*, who is to be a responsible person, exhibits a bill in her behalf (*c*); but it must always be *with her consent* (*d*). In some cases, as where she cannot in conscience consent to the husband's answer (*e*), she will be permitted, on an *order* obtained for that purpose (*f*), to defend the suit separately; and even without such *order*, if the suit be at the instance of the husband (*g*). A woman, whose husband is an exile, alien enemy, or has abjured the realm, is in all respects considered as a feme sole (*h*).

(*a*) Prec. in Ch. 376. 1 Atk. 570.

(*b*) Mos. 47 186. 2 Eq. Ca. Ab. 238.

(*c*) 2 Ves. 452.

(*d*) Prec. in Cha. 376

(*e*) 2 Atk. 49.

(*f*) Mitf. 83.

(*g*) 3 Atk. 478.

(*h*) Mitf. 84. and 2 Vern. 104.

Ideots and *lunatics* carry on suits by their committees (*i*); and in some instances the attorney-general will exhibit an information on their behalf (*j*). And the committee of the estate of an ideot or lunatic, must be made defendant with the person whose property is under his care (*k*).

All persons whatever may be sued in Chancery, except the king and queen. In matters which impeach a *vested* title in the crown, the application must be to the king by petition of right: but in cases of public trust, or where its interest is only incidentally affected, the attorney-general is made a party to a suit in Chancery, with respect to such interest (*l*).

The general rule is, that all persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court (*m*). Thus, if two or more have a joint interest, they must be all parties. So if two or more be liable to a demand, you cannot prove against one alone. So all executors, trustees, or their representatives, are

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(*i*) Eq. Ca. Ab. 279.

(*j*) 1 Cha. Ca. 112, 153.

(*k*) 1 Cha. Ca. 19.

(*l*) Mitf. 3d ed. 24. 1 P. Wms. 445.

(*m*) Prec. in Cha. 83. 2 Atk 510. 1 Mer. 262.

to be made parties (*n*). But this general rule holds with the restriction, that no one need be made a party, against whom, if brought to a hearing, the complainant can have no decree (*o*). Thus in general, a residuary legatee need not be made a party (*p*); and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees, under the commission, the bankrupt himself need not be made a party (*q*).

Of these several parties to the suit, some have an immediate or proximate relation through the subject of litigation; others have only an incidental or derivative interest therein: and hence they may be divided into *principal* and *collateral*. And this is a distinction useful to be kept in view, for the clear perception of the scope of the bill, and for determining who are the necessary parties to the suit.

(*n*) Hinde, 12.

(*o*) 3 P. Wms. 310, in note.

(*p*) 1 Bro. C. C. 303. 1 Madd. Rep. 446.

(*q*) Hinde, 13, and 2 Vern 32, therein cited. 1 Ves. and Beames. 550. See further, as to the necessary parties, Part II, cap. 3, sect. 1.

SECTION II.

Of Filing the Bill, and the Defendant's Appearance; and herein of the Process of the Court.

All the office business relative to the pleadings, &c. in this court, is transacted by six principal officers, styled six-clerks, who have each under them, as assistants, several subordinate clerks, called clerks in court. Now after the bill is drawn and signed by counsel, it is engrossed on parchment, and carried to some one of the clerks in court, who, having entered it in his book, delivers it to his immediate superior, the six-clerk, to be filed; and then it is said to be of record, and bears date from the day on which it is brought into the office (*a*). When the bill is filed, the party is regularly entitled to have a *subpœna*, which he obtains upon application to the proper office: but by the stat. 4 and 5 Ann. c. 16. no *subpœna* or other process for appearance shall issue till after the bill is filed with the proper officer, except in cases of bills for injunction to stay waste, or stay suits at law *commenced.*

The *subpœna* in Chancery is a mandatory

(*a*) Beames's Ord. in Chan. 168.

writ, or process, issuing under the great seal, directed to a party, summoning him to appear, under a penalty—*sub pœna centum librarum;* to answer to such things as are objected against him, either on any day certain within the term, which is the *ordinary* return; or during the vacation, immediately: but this latter, which is an *extraordinary* return, will be granted only on petition or motion, and an affidavit, stating that the defendant lives within ten miles of town. When the party has been regularly served with this writ, he must put in his appearance, if he reside within twenty miles of London, in four days at least, exclusive of the service of the writ. If he reside above twenty miles from London, it is then termed a country cause, and the defendant has eight days to put in his appearance (*b*). But if he refuses or neglects so to do, he is in contempt, and further process will be awarded against him. Although it is beside the purpose of the present treatise to enter into a minute detail of the process necessary to compel the attendance of the defendant; yet, in giving an outline of the progress of a suit, it will be proper, in order to have a consistent view of the whole, briefly to enumerate the compulsory steps used to bring the party into court.

When, therefore, the defendant has incurred a

(*b*) Beames's Ord. in Cha. 169.

contempt by not appearing within the time limited by the rules of the court, an *attachment* will issue against him. This is a writ directed to the sheriff, or other ministerial officer of the county where the defendant generally resides, commanding him to attach the party in contempt, and have him before the court on a certain day, to answer for the contempt, as well as all other charges which may be brought against him. It must be returnable in term; and there should regularly be fifteen days between the *teste* and return of this and all subsequent writs, in order to proceed to a *sequestration*, or take a bill '*pro confesso*;' otherwise, if the defendant live within ten miles of town, an order may be obtained by motion or petition, to have them returnable *immediate* (c).

Upon this writ the sheriff returns either '*cepi corpus*,' or, if the party be not taken, '*non est inventus*.' In the first case, it is usual to move for a messenger, who is an officer of the court, subordinate to the serjeant at arms, to take the prisoner into his custody, and remove him to the Fleet, which is the prison of this court. A *habeas corpus* is next had to produce him in court, where he is admonished to appear and answer, and a day is assigned him for that purpose. If he is obstinate in refusing so to do, an *alias habeas corpus* is issued; then a *pluries habeas corpus*; and finally,

(c) Hinde. 100.

an *alias pluries habeas corpus*. If the defendant still continues in contempt, an appearance will then be entered for him, pursuant to the stat. 5 Geo. II. c. 25; and the clerk in court attending with the record of the complainant's bill, the matter thereof will be decreed to be taken '*pro confesso*' against the defendant. If, when the sheriff returns '*cepi corpus*,' the party had been already in custody, a *habeas corpus cum causis* goes to the keeper of the prison, or warden of the Fleet, requiring them to specify *the causes* of such previous commitment. The return of these writs of *habeas corpus* is always on a day certain, either in or out of term, and there is no limited time between their *teste* and return (*d*).

In the other case, when the sheriff returns *non est inventus*, an attachment with *proclamations* is next ordered, commanding him to issue a proclamation, calling upon the defendant to surrender upon his *allegiance*, and otherwise to take him if he can be found.

If he still holds out, and *non est inventus* be again returned, the next process is a *commission of rebellion*. The commissioners to whom this writ is directed are usually nominated by the complainant, and can justify breaking open doors (*e*) in executing its commands, which are

(*d*) Hinde 111. (*e*) Gilb For. Rom. 76.

to take the person of the defendant wherever he may be found.

Each of the above steps is taken as of course, upon the return of the process immediately preceding; but the two remaining ones can only be had on application to the court by motion (*f*); because, being the acts of the court itself, it will not order them without being certified of their propriety. Being informed therefore of the inefficacy of the former process, it will next send its immediate officer, the *Serjeant at Arms*, in search of the party; and on his certifying that he is not to be found, it next proceeds to a

Sequestration; which is the last process to compel obedience. Hitherto the proceedings were *in personam* merely; but this last is *in rem*, and is a commission under the great seal, directed usually to four persons named by the complainant, or sometimes to the sheriff, empowering him, or any *two or more* of the commissioners, to enter upon and possess the real and personal estate of the defendant, (or some particular part and parcel of his lands) and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their

(*f*) Gilb. For. Rom. 77, 81—2.

hands, to be disposed of at the discretion of the court, until the party shall have performed the matter, for refusing or neglecting which he is in contempt. A sequestration can only be obtained upon motion, and not upon petition (*g*).

If a third person claim the *real estate* under a title paramount to the sequestration, he shall not be compelled to file a bill, but may contest such title in a summary way, and move by his counsel to be examined touching it before a master. This is termed an examination *pro interesse suo.* The complainant exhibits interrogatories to the party; and proof having been gone into, if necessary, the master reports accordingly, and thereupon the court pronounces its judgment: and if it appears that his claim be well founded, orders the sequestration to be discharged as against him (*h*).

A sequestration commonly issues against both the personal estate and the rents and profits of the real estate, which are seized by the sequestrators and kept in their possession, but cannot be sold except by the decree of the court; for this process is only to form the foundation of

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(*g*) Beames' Ord. Cha. 215 & *vide infra*, p. 55 *et seq.*

(*h*) Gilb. For. Rom. 80-1.

taking the bill *pro confesso* (*i*). If the suit be for land, the court sometimes orders the profits to be delivered to the complainant, and will frequently even grant him an injunction to put him in possession until further order (*k*).

This is the usual course when the defendant obstinately holds out, and refuses to abide the orders of the court *after appearance entered.* If the defendant, however, did not appear, or was not taken on process, the complainant formerly had no means of redress: to remedy which the 5th Geo. II, c. 25 was enacted, which directs, that if a defendant absconds to avoid being served, upon a positive affidavit of the fact, the court, upon motion, will fix a day for him to appear, which order must be inserted in the Gazette, &c., in pursuance of the act; and if the defendant refuses to appear, upon affidavit thereof, the bill will be taken *pro confesso.* And this act extends to cases where, after appearance, the defendant absconds, so as to avoid being served with subsequent process at any stage of the suit (*l*).

(*i*) Hales *v.* Shafts, 3 Bro. C. C. 72. Crawley *v.* Clarke, *ibid.* 372.

(*k*) 3 Ves. Jun. 23. — Wyatt's Prac. Reg. 386.

(*l*) Mawer *v.* Mawer, 1 Cox, 104.

Such is the mode by which the Court of Chancery proceeds to enforce obedience to its orders, whether it be to appear, to answer, or to do any other matter, either before or after the hearing, which the court in its wisdom may direct. The party in contempt may come in at any stage, and upon paying the costs incurred, discharge the process against him. There remains a word or two to be said concerning peers, privileged persons, and corporations.

With regard to *peers*, *peeresses*, and *bishops*, from respect to their dignity, when a bill is filed against any of them, the chancellor always writes a complimentary letter to inform the party of the complaint, and to request his appearance in court; which is entitled a *letter missive*, and is obtained upon petition, as of course. The original letter, with a copy of the petition, and office copy of the bill, must be served personally, or left at the defendant's place of residence (*m*). If the letter be not attended to, a *subpœna* issues as in ordinary cases; but the next immediate process is the sequestration, because the privilege of parliament protects the *person* from arrest. For the same reason, therefore, members of the House

(*m*) *Vide* 47 Geo 3 c 40.

of Commons must be proceeded against by sequestration, omitting the intermediate steps, from the *subpœna*. In neither of those cases, however, will the sequestration be granted in the first instance, but eight days are allowed to the party to come in and shew cause why the sequestration should not issue. The first application therefore is for a *sequestration nisi*, i. e. *unless* the party shall shew cause to the contrary; and the order thus obtained being *personally* served upon the party, if within eight days after the service he does not attend, the order will be made absolute.

Corporations, being invisible persons, cannot be arrested; and therefore the next process for them, after *subpœna*, is a *distringas*, directed to the sheriff, to distrain their goods and chattels, with an *alias* and a *pluries distringas*, and finally a sequestration. Officers of the court, on default of appearance, are *suspended* until they obey process, or a *sequestration nisi* is awarded against them, which is in the nature of a suspension (*n*).

When an *infant* defendant does not appear, an *attachment* issues *pro formâ*, but a messenger

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(*n*) Mos. 238.

is always sent to bring him into court; where, if no friend or relation offers to act as his guardian, one of the clerks in court not towards the cause, will be appointed to act in that behalf (*o*).

As has been already stated, when the defendant has been served with a *subpœna*, he is to put in his appearance after the return of the writ, which is a *voluntary* appearance; or such appearance may be compulsory, by means of the process above described. The manner of entering an appearance is by the defendant's employing or retaining a clerk in court, who leaves a notice in writing with the clerk of the opposite party; after which he takes the bill off the file, and enters a note of having done so in the six clerk's book. But if a clerk in court has already appeared for any other defendant to the bill, on application being made to him, the bill is obtained, and an office copy made therefrom.

(*o*) Hinde. 240.

CHAPTER IV.

OF PREPARING AND FILING THE PLEADINGS ON THE PART OF THE DEFENDANT.

THE defendant having perused the bill, is next to answer the distinct interrogatories contained in it, unless he can take *exceptions*; either, first, by shewing that there is some reason *apparent on the face of the bill*, why he should not be called upon to answer at all, or to some particular part of the bill; which is called a *demurrer*: or, secondly, by stating *some new fact*, which would discharge him from the necessity of doing so; and this is termed a *plea*: or, thirdly, he may demur as to part, and answer the remainder; or plead in part and answer in part; or he may plead, answer, and demur, to distinct parts of the same bill. If a defendant has no interest or concern in the matter in litigation, he puts in a *disclaimer* of all right or title thereto. A bill may likewise be referred to the master, for scandal or impertinence, that the records of the court may not contain any thing improper or unnecessary.

SECTION I.

Of the Orders for Time.

When the defendant resides within the circuit of *twenty* miles from town, it is termed a *town cause;* if beyond that range, a *country cause.* In town causes the defendant has *eight* days allowed him after filing his appearance, to put in his answer or other pleading; but the court will, *as of course,* grant three separate orders for further time, on being applied to by motion or petition for that purpose; the first for a month, the second three weeks, and the third a fortnight; but this last has a condition annexed, that the defendant undertakes to pray no further time. The usual order for time is *to plead, answer, or demur,* not demurring alone: but if the defendant obtains the order to *answer only,* he will be permitted to put in a plea (*a*), which is a special answer, but he will not be allowed to demur, though coupled with an answer (*b*);

(*a*) 2 P. Wms. 464. 1 Vern. 275 3 P. Wms 80 Mos. 207, and Roberts *v* Hartley, 1 Bro. C. C. 56

(*b*) Kenrick *v.* Clayton, 2 Bro. C.C. 214. Contra, Haster *v.* Weston, 1 Vern. 463.

nor can he extend the order for that purpose(*c*). If, however, the defendant cannot perfect his answer within the time prescribed by the several orders above-mentioned, he may make a further application, stating the circumstances of the case, which the court will grant upon condition that the defendant enter his appearance with the register, as upon an attachment returned, and consent that a serjeant at arms should go against him, if the time should expire without his having put in an answer (*d*).

These orders are to be served upon the complainant's clerk in court, and each successive one ought to be served before the preceding order expires; otherwise, in strictness, the defendant may be attached at the expiration of the time, for want of an answer; but this rarely occurs: for by the courtesy of the office, when the time has elapsed, the defendant's clerk expects to be called upon by the other side for an answer, and to have notice of attachment before any attachment is actually sealed, in order to give his client an opportunity to procure an order for time.

(*c*) 1 Ves. & B. 184. Philips *v.* Gibbons.

(*d*) Hinde. 226.

SECTION II.

Of the Demurrer.

When the defence to the bill is by demurrer only, the draft of the demurrer being settled and signed by counsel, a transcript must be engrossed on parchment and delivered to the defendant's clerk in court, to be *filed.* A demurrer, as it asserts no fact, but relies on matter apparent on the face of the bill, is put in without oath, and without being signed by the party. It is therefore considered that the defendant may, by advice of counsel, upon sight of the bill only, be enabled to demur; and for this reason a demurrer, not coupled with a plea or answer, must be filed within the eight days, as the court never indulges a defendant with time to demur *only;* nor can a demurrer under an order for time be regularly filed, it being the especial condition of every such order, that the defendant shall not demur alone. Nor can the strictness of this rule be eluded by answering any immaterial fact, or denying combination only; for a demurrer accompanied with such an answer, is not esteemed to be within the terms of the order (*e*).

(*e*) 8 Ves. 526. 2 P. Wms. 289. 1 Bro. C. C. 78.

Within eight days after the demurrer is filed, the defendant's clerk in court must leave a note with the register, to have it *entered* for argument; and if it be not *entered* within the limited time, it is overruled of course (*f*), and the complainant may take out process for costs, and to make a better answer. So if a demurrer be accompanied with a plea or answer, or both, the demurrer and plea must be entered, or they are overruled of course. When the demurrer is entered with the register, either party may, upon application by petition, at the office of the chancellor's secretary, obtain an order to have it set down for hearing; and such order being entered at the register office, a copy thereof is to be served upon the opposite clerk in court, two days at least before the day appointed for hearing, to give time to prepare counsel's briefs. If the demurrer be allowed, the complainant's bill, or such part of it as is demurred to, is dismissed of course, and the defendant is awarded a *subpœna* against him for costs. In case, however, the matter demurred to is a slight mistake, which may be rectified by amendment, the court will make a special order for that purpose, instead of allowing the demurrer (*g*). If, on the other hand, a demurrer to the whole bill is overruled, the complainant on his part issues an at-

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(*f*) Beames. Ord. Cha. 77. (*g*) Mitf. 175. 9 Ves. 221.

tachment against the defendant for *want* of an answer, and a *subpœna* for costs. But when the demurrer is to part of the bill only, and coupled with an answer to the remainder, after the demurrer overruled, exceptions must be taken to the answer. So if there be demurrer and plea, exceptions must be filed to the plea, if ordered to stand for an answer. When demurrer to part, and answer to the remainder of the bill are put in, the answer cannot be proceeded on until the demurrer has been determined, for until then it cannot be known whether the answer is sufficient. A complainant may amend his bill, upon payment of twenty shillings costs, after a demurrer is put in, if it be not set down to be argued; and after it is set down, upon payment of the costs of the demurrer (*h*).

SECTION III.

Of the Plea.

The same rules hold with regard to the filing, entering, and setting down of pleas for argument; with this difference only, that as pleas

(*h*) Wyatt, Prac. Reg. 68. 1 Dick. 358.

state new matter of fact, which may be put in issue, they must be *sworn* to, in the manner described in the following section, when treating of answers, except those which merely go to the jurisdiction of the court, or the disability of the complainant, or state some matter of record; for these being points not controvertible, or easily ascertained, are taken on the authority of counsel. The time allowed for filing pleas necessary to be sworn, is the same with that of answers, above described.

But though a plea should be good in point of law, and be allowed on argument, yet this does not, as in the case of demurrer, terminate the proceedings; for the facts on which it rests may be untrue; and if the complainant has reason to doubt their truth, he may reply to the plea, and take issue upon it, and proceed to examine witnesses, as in case of an answer (*i*); but when he replies to a plea before it comes to be argued, it is always an admission of its validity, as if it had been argued and allowed; and if the defendant prove his plea, the bill must be dismissed at the hearing. So if the complainant amend his bill before he argues his plea, it is an admission of the goodness of the plea (*j*).

(*i*) *Vide* Cap. 10, *infra*. (*j*) Gilb. For. Rom 95

When the complainant replies to the plea, whether its validity in law be allowed on argument, or admitted by the complainant, the only question which remains is, as to the truth of the facts alleged by the plea. Should these be established by proof, the bill must be dismissed at the hearing, since the plea is thus substantiated as a bar, or in abatement of the suit. But on the other hand, when the facts are not borne out by evidence, the plea, which only rests on the supposition that the facts are true, falls to the ground; and in such case, as the complainant would have been entitled to a full answer upon oath from the defendant, but for such plea, which, as before stated, is used as an *exception* to answering, he will be allowed to examine the defendant upon interrogatories before the master, in order to obtain the discovery, of which he was thus wrongfully deprived.

Sometimes the court, instead of allowing a plea, will order the benefit of it to be saved to the hearing. This occurs, when allowing the facts of the plea to be strictly true, circumstances may come out in evidence which would avoid the effect of the plea; and the court will not therefore preclude the question (*k*). At

(*k*) Beames's Pleas, 319. Mitf. 245.

other times the court will order the plea to stand for an answer (*l*); which is done when, supposing the plea to be a good defence, so far as it goes, yet that it is not a full defence, or is informally pleaded, or is not sufficiently supported by answer, which is in some cases necessary, as will be fully explained in a subsequent chapter (*m*). When the plea is ordered to stand for an answer, the words 'with liberty to except,' are usually added; as otherwise, according to the strict letter of the order, the complainant could not take exceptions to it. This liberty is however frequently qualified so as to protect the defendant from a discovery which would be prejudicial to him. But where the informality of the plea was owing to a slight mistake, the court has allowed the plea to be amended (*n*).

Pleas of outlawry and excommunication, which are pleaded *sub pede sigilli*, and pleas of a former decree, and another suit depending, which can rarely admit of dispute, either as to the law or the fact, are referred at once to the master for enquiry; and if he reports the plea to be true, the bill stands dismissed. But the complainant may except to the master's report,

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(*l*) Beames's Pleas, 319. Mitf. 245.

(*m*) *Vide* Part ii. cap. 1 & 4.

(*n*) 2 Anst. 411.

or set the plea down to be argued for informality.

Pleas must be signed by counsel as well as by the parties, and are taken by commission in the country, or sworn before a master in town, in the same manner as answers; which will be described in the following section.

SECTION IV.

Of Answers, and herein of the Dedimus.

If the defendant has no just cause of exception against the complainant's bill, he must proceed to answer upon oath all the material allegations contained in the bill, by confessing and avoiding, or traversing and denying, each of them separately and distinctly, according to the best of his knowledge, recollection, information, and belief. But should the bill seek a discovery of a circumstance which may cause a forfeiture of any kind, or convict a man of any criminal misbehaviour, the defendant may demur to such discovery, and refuse to answer; for which reason the bill must distinctly waive the penalty, when it calls upon the defendant to admit or

acknowledge any fact which would render him liable to a personal forfeiture between the parties.

A defendant cannot pray any thing in this his answer, but to be dismissed the court; if he has any relief to pray, or discovery to seek, against the complainant, he must do so by a bill of his own, which is called a *cross bill.* The two bills, the original and cross bill, are then usually brought to a hearing together, and are considered as forming in fact but one cause; but this will depend chiefly on the activity of the defendant, who will otherwise have his cross cause heard to considerable disadvantage (*a*). The answer being prepared and signed by counsel, is engrossed on parchment, and the defendant is then sworn to the truth of its contents before one of the masters in the public office, and signs his name at the foot of the answer, in the presence of the master, who makes a memorandum of the swearing, with the date of it (called the *jurata,*) on the answer. The like method is used with regard to pleas. A peer or peeress, *propter dignitatem,* puts in a plea or answer, on protestation of honour only; a corporation, under their common seal.

(*a*) *Vide infra,* cap. 11, sec. 2

A suit instituted against a defendant residing above twenty miles from town is, as before observed, termed a country cause; and the party in that case is entitled, if he thinks proper, to have a commission under the great seal, to take his answer in the country. This commission is styled a *dedimus*, from the operating words in it, '*dedimus potestatem*,' &c. In country causes the defendant is seldom called upon to answer till the ensuing term; and the court in this case, as well as in town causes, grants three orders for time, with the same circumstances and restrictions. The first order in a country cause gives six weeks, the second one month, and the third three weeks. But if a defendant in the country does not require a commission to take his answer, he should regularly answer within the eight days, as in ordinary cases.

The *dedimus* is of two kinds, *ordinary* and *special*. The first, which is a commission to take an answer only, being that to which the defendant is entitled of course, is made out by a clerk in court, without an order, merely leaving a note in writing with the complainant's clerk, to call upon him for commissioners' names; and this is termed *craving* a *dedimus* (*b*).

(*b*) Hinde, 231.

Each party inserts what commissioners names he thinks proper, and the complainant's clerk in court at the same time directs (as instructed by his client) to which of his commissioners the defendant is to give notice of executing the commission. When the complainant will not name commissioners on his part, an application must be made to the court for an order upon him to name commissioners in two days, or that the defendant may be at liberty to take his commission *ex parte*. After a contempt duly prosecuted to an attachment, with proclamations returned, no *dedimus* is to go without motion (*c*).

A *special* dedimus is, where the defendant is advised to demur and answer, or plead and demur, or to demur, plead, and answer; for which purpose the order is to be applied for by motion or petition: but in no case can the defendant demur alone; because a demurrer being taken by counsel only, and put in without oath, a commission is unnecessary, and would only occasion expence and delay. A plea alone, however, may be returned, even under an ordinary dedimus, because when sworn to, it is a species of answer.

A *dedimus* may be made returnable on a ge-

(*c*) Beames' Ord. Cha. 178.

neral return day, or on a day certain in term; but it is usually made returnable without delay, which, if made out in term, holds to the first return of the ensuing term; if in the vacation, to the last return of the subsequent term. The proceedings, however, are generally adapted to the convenience of both parties; and what time the defendant shall have, is usually settled amongst the clerks in court on both sides.

The *dedimus*, when sealed, is sent to the defendant's solicitor or agent in the country to be executed, who must give six days notice to the complainant's commissioners to attend, unless it be made out *ex parte*. One commissioner attending on each side is sufficient; but in case none of the complainants' attend, the defendant must have two of his commissioners, because no less than two can return the writ. The commission is opened, at the time and place appointed, by one of the defendant's commissioners, and the like oath is administered, and the same forms observed, as when an answer is sworn in town at the public office. The answer, or other pleading, thus taken, is annexed to the commission; at the foot of which answer the commissioners make a *note* of such taking, with the time and place, called the *caption* of the answer. If there be schedules, they are all to be annexed to the commission; and then the commissioners

are to fold up the commission, binding it round with tape, and putting their names and seals thereto, and to direct it to the defendant's clerk in court. If one of the commissioners bring the answer, and deliver it sealed into the hands of the clerk in court, it is accepted without oath; but when sent by a messenger, the defendant's clerk in court takes him before a master, where he swears that he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened nor altered since he so received it; and the receipt of it is in both cases indorsed by the clerk. The party which is entrusted with the execution of the *dedimus*, is said to have the *carriage* of the commission; and if the first commission is lost by reason of the default or neglect of the party who had the carriage of it, the carriage of the second will be given to the adverse party. But no second commission will be granted, without the special order of the court, upon good reason shewn, or upon the consent of the complainant (*d*).

There may also be a commission to the country, for assigning a guardian *ad litem* to an infant; or it may be for the double purpose of

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(*d*) Beames' Ord. Cha. 178

assigning a guardian, and taking the answer of such guardian. In a town cause, the guardian is appointed in open court, upon a personal attendance of the parties. A commission likewise issues for appointing a guardian to a person reduced by age or infirmity, to a state of second childhood. This is obtained upon special application, and is not affected by the distinction of town and country, but may be executed any where. With respect to ideots and lunatics, the guardianship is rarely or never assigned as in other cases, the committee of the estate usually applying to be appointed, which is ordered of course.

The answer, when sworn, is left at the public office, until the defendant's clerk in court takes it to be filed, upon notice given him by the solicitor for that purpose. The clerk in court having annexed the answer to the bill, files it with his six-clerk, who then transmits it to the study of the complainant's six-clerk, whence it is taken by the clerk in court, first marking an entry thereof in the six-clerk's book.

CHAPTER V.

OF INTERLOCUTORY ORDERS, AND REFERENCES TO THE MASTER.

At this stage of the proceedings, the bill and answer being now filed, the complainant has to consider what next step he shall take in the suit. If the answer admits the material allegations of the bill, the parties may be in a condition to proceed to a hearing immediately; but if, on the other hand, the answer traverses or denies the substance of the bill, the complainant must proceed to join issue by a *replication*, and prove his case by the *examination of witnesses*. These therefore are the next proceedings in the regular progress of a cause to the hearing: and of each of these in their order.

But on perusing the answer, the complainant may find it prudent to dismiss his bill altogether, or as against some of the defendants; and this he is entitled to do as of course, at any time before the decree, upon payment of costs: or finding his bill deficient for the purpose of eliciting the discovery necessary to his case, he may move to amend his bill; or, as frequently

occurs, the answer itself may be insufficient, scandalous, or impertinent, in which case he moves to have it referred to a master; or, lastly, it may be proper to apply to the court for some special order connected with the object of the suit, as for the production of papers and writings; for the payment of money into court; and such like. Before we proceed therefore with the regular course of the pleadings, it will be convenient here to state succinctly the nature of those incidental proceedings which form the groundwork of interlocutory orders; and herein of references to the master, and his report.

SECTION I.

Of Motions and Petitions.

As soon as the bill is of record (*a*) the cause is regularly in court, and the court will then entertain various applications touching the suit and the matters in litigation, and issue its directions thereon, usually termed *interlocutory orders*. These orders are either *common* or *special*. Common orders, being such as concern matters

(*a*) *Vide ante*, p. 28.

incident to *all* suits, are provided for by the usual proceedings of the court, and are therefore obtained as a matter of course, without notice and without opposition; such as orders for the different processes of contempt, already described, and the orders for time to answer. Special orders are those which arise out of the peculiar circumstances of the case, and are never granted but on due deliberation, and notice given to the adverse party; such as the order for the production of books and papers, for the payment of money into court, and the like (*b*).

The application for interlocutory orders is either by motion or petition; motion by counsel, "*ore tenus*" in court; petition in writing addressed to the person holding the great seal, or to the Master of the Rolls; which, after being engrossed, is delivered to the secretary of the judge to whom it is addressed, who is to get it answered. In general the same objects may be obtained in either of those ways; but there are some orders which will be granted on petition *only*; as, on the other hand, some can be applied for only by motion. This difference arises from the different nature of the two modes of application. Motions, when they are not for a com-

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(*b*) For those *orders of course*, termed *rules*, see *post*, cap. 11, sect. 1, n. (*b*); and *vide* Curs. Can. 326.

mon order, (which are motions of course) can only be made upon notice given to the adverse party two days before, inclusive, and affidavit filed of the service thereof on the clerk in court. The notice, however, specifies no more than the names of the parties, and the object intended to be applied for; whereas, a petition sets forth the ground-work of the application, and when filed, becomes matter of record. Wherever therefore the nature of the case is such that the court or adverse party ought to be put in previous possession of the grounds of the application; or that the reasons for granting the order should remain recorded; the application should regularly be by petition, and not by motion. Thus an application to the court to give effect to a a decree or order of a long standing, must be by petition (*c*); so likewise, an order to pay money out of court can be had only on petition (*d*). And where the application is merely of a personal nature, asking a favour, the usual course is by petition, through the secretary of the judge; as, to set down a cause for further directions, or to set down demurrers, pleas, and exceptions for argument; or to set down a cause for an early day. But, again, *motions* are always made in

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(c) 13 Ves. 393.

(d) *Ibid.* & *vide* 2 Mad Chan. Prac. 580. 495.

open court, where all parties, and the public at large, are present. Whereas, petitions are in some cases a private and '*ex-parte*' proceeding. The express orders of the court of Chancery, therefore, restrain the proceeding by private petition, where notice to the other side is requisite. Thus, "no injunctions for stay of suit at law shall be granted, revived, dissolved, or staid, upon petition, nor any injunction of any other nature shall pass by order upon petition, without notice, and a copy of the petition first given to the other side, and the petition filed with the register, and the order entered; no sequestration, dismission, retainers upon dismissions, or final orders, are to be granted upon petition. No former order made in court is to be altered or explained upon a petition, or commitment of any person taken upon process of contempt to be discharged, but upon hearing the adverse party, his attorney or clerk towards the cause (*e*)."

Special orders are sometimes made by *consent* of parties, which are not warranted by the general rules of the court; but in such cases the special reasons which induced the court to depart from its ordinary course, must be recited in the order.

(*e*) Beames, Ord. Chan. 214—5.

In cases where the party is *primâ facie* entitled to the order applied for, at the same time that a fair objection to it, not then apparent, might by possibility be brought forward on the other side, upon notice given, the court will only grant the order conditionally, termed an *order nisi*, i. e. unless good cause be shewn against it by a certain day. Such is the *order nisi* for a sequestration against a peer, or member of the house of commons. The notice therefore to the opposite party being material, all *orders nisi* must be *personally* served, and an affidavit of such service produced, before the order can be made absolute. For the same reason, orders which seek to bring the party who is the subject of them into contempt, must be served personally; all others being usually served on the clerk in court, by leaving them at his seat in the six-clerk's office.

SECTION II.

Of References and Reports.

The application for a special order, whether by motion or petition, is usually supported by an affidavit of the facts relied on; which must be filed in sufficient time for the opposite party to

know its contents. In some cases the matter of the application will be determined in the first instance, on hearing counsel on both sides; but if the facts are doubtful or complicated, the court will direct a *reference to the master*, to enquire into the particulars, and *report* accordingly.

A *reference* is an order of court, whereby exceptions, contempts, irregularities, matters of account, the choosing of guardians, receivers, purchasers under a sale directed by the court, and such like, are referred to a master to examine and make a report of to the court, so that the court may make an absolute order therein; and sometimes the master is empowered by such order of reference, finally to determine or settle some matter therein mentioned(*f*). The master, on having the order of reference produced to him, grants his *warrant* of summons for the parties to attend him at his chambers, which is *served* on the adverse party, or his clerk in court, by shewing it, and delivering a copy; and one whole day must intervene between the day of service and the day appointed for attending the master. If the party is not in attendance at the time appointed, a second and a third warrant is issued; but the third warrant is peremptory, and

(*f*) Curs. Can. 426.

the master is to make his report '*ex-parte*' of that side that attends, and desires it.

When both sides are present, the master, on examination of the several matters referred to him, makes his report, which is his certificate to the court of the state of the facts, as they appear to him, or of whatever else it may be his duty to inform the court; and such report must *briefly* express the master's opinion, and not the *special* circumstances, unless the master cannot take it upon him to decide, or the court has given directions to that effect. The report must not on any account exceed the order of reference(*g*).

All reports are founded either on matter of *fact*, or matter of *opinion*; and in the investigation of the former, if it be necessary for the master to *examine witnesses*, in order to ascertain the facts referred to him, he is authorized to do so, and a *subpœna* issues for that purpose; and where the witnesses reside in the country, a commission issues of course, upon the master's certifying that it is necessary.

A person once examined before the master cannot be *re-examined* without an order for that purpose; nor can one who has already been a witness in the cause be examined on a reference

(*g*) Beames' Ord. Cha. 23. Curs. Can. 430. 1 Mer. 179.

before the master, without an order to that effect; and then not to any matters he had before been examined to, or in which he may be interested; to provide against which the master himself settles the interrogatories to be exhibited to him. In like manner, interrogatories for the examination of a *party* are settled by the master, and not as in the case of ordinary witnesses, by counsel. Depositions taken in the country, when returned, are filed by the six-clerks; but those taken before the masters are kept in their offices. If evidence be improperly admitted, exceptions may be taken, as also to an examination generally, if the party considers it insufficient (*h*).

All reports which are to be the ground of a decree, must be *confirmed* by the court: none others require confirmation, but may nevertheless be excepted to, if either party has reason to be dissatisfied. In the former instance, however, in order to warrant the party in bringing his exceptions before the court, he must have previously stated his *objections*, in writing, to the master; otherwise he is precluded from excepting, unless by special order. In a report, therefore, that requires to be confirmed, the master,

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(*h*) See further, as to the examination of witnesses, *post*, cap. 10, sect. 1.

before he affixes his signature, prepares a draft of it, which the parties have liberty to peruse and copy; and if either of them have objections to make, he sends in the same in writing, and takes out a warrant to be heard thereon. When the objections are decided, the master *settles* his report, after which no evidence is admitted; and either side may then take out a warrant to attend the *signing*, which is the last stage in the master's office.

After the report is signed by the master, it is to be *filed* with the register, strictly within four days after signing (*i*); but it is sufficient if the report be filed before any proceedings be had thereon (*j*). Where the report is to be the ground of a decree, an *order nisi* must then be obtained to *confirm* it; and if no cause is shewn within the time mentioned in the order, it will be made absolute upon an affidavit of service, and a certificate from the register that no order has been obtained for *setting down* exceptions to be *argued;* in which case the court would stay proceedings on the report. But merely filing the exceptions and making the deposit (*k*), would not be sufficient for that purpose. A report

(*i*) Beames' Ord Cha 293
(*j*) 2 P. Wms. 516
(*k*) *Vide* the next page

may, *by consent*, be confirmed absolutely in the first instance.

Exceptions to a report are signed by counsel, and must usually set forth the *particular* points in which the report is complained of as erroneous, unless where such a proceeding would be attended with expense or prolixity; in which case the court will permit a general exception to be filed; as where the master reported a schedule to an answer impertinent. These exceptions are filed with the register, and a *deposit* of five pounds made with them, which is to go to the party prevailing on the argument. When filed, either party may obtain an order to set them down for argument.

The time for excepting to a report, when it requires confirmation, is, as we have seen, before it is confirmed absolutely; but sometimes the court will enlarge the time (*l*). In other cases there is no precise time fixed; but where the master reports an answer insufficient, the complainant may sue out an attachment for want of an answer, unless exceptions are filed and set down for argument within eight days after the service of *subpœna* for a better answer; and exceptions cannot be filed after an attachment (*m*).

(*l*) Gilb. For. Rom. 169. (*m*) Newl. Cha. Prac. 347.

On the argument, no evidence will be admitted which was not laid before the master upon the objections; nor will subsequent affidavits be received unless they clearly shew error in the report; and in such case the court will direct the master to *review* his report, on the exceptant's giving up the deposit(*m*). The chancellor will likewise direct the master *to review* his report in *cases* concerning *minors*, if on petition presented, praying a *review*, such report appears to be incorrect: for to reports of this nature no exceptions will lie, because these cases are not properly the subject of *reference* to the master, but are rather special delegations of the Chancellor's *official* jurisdiction.

After the facts or other matters thus referred to the master are decided by the report, the court will proceed to pronounce its order thereon. No order can be made use of until it is *drawn up*, *passed*, and *entered*. The order is *drawn up* by the attending register, as it is pronounced by the court; and the register must recite any former order which has been made touching the same matter; after which he delivers a copy of the minutes to the solicitors on both sides. If there be any doubt as to the meaning, the solicitors on both sides attend the

(*m*) 2 Atk 408. 3 P Wms 141

register, in order to *settle* the order; and if by this means it cannot be decided, the court must be applied to, to explain the minutes. Four days are allowed to return the copy of the minutes, with objections, if there be any, before the order is *passed;* which is done by the register's signing his initials at the left-hand side of it. It is next *entered;* that is, copied *verbatim* by the entering register, in the register's book, who uses the word '*entered*' at the foot of the order. All orders drawn up by the register are to be passed and entered in *due* time. By the orders in Chancery, interlocutory orders, as well as decrees and dismissions made in Michaelmas and Hilary terms, are to be entered before the first day of Michaelmas term following, and those of Easter and Trinity to be entered before the first day of the ensuing Easter. It is therefore a frequent application, to enter an order '*nunc pro tunc;*' and this is a motion of course, where the party comes *recently;* but after a length of time there ought to be notice of such motion (*n*). Orders are enforced in the same manner as decrees; which will be treated of in a subsequent chapter.

(*n*) Wyatt's Prac. Reg 291, and *vide* Gilb. For. Rom. 163

CHAPTER VI.

OF INJUNCTIONS, NE EXEAT REGNO, AND CERTIORARI.

BEFORE we conclude this head of Interlocutory Orders, it will be proper to give a particular consideration to that peculiar class which are specifically prayed for by the bill, namely, the order for an *Injunction*, for a *Ne Exeat Regno*, and a *Certiorari*.

SECTION I.

The Injunction.

An Injunction is a prohibitory writ, directed to the defendant, to restrain him from doing some act contrary to equity and good conscience, whereby the complainant would be aggrieved; and which therefore forms a principal part, and sometimes the whole, of the relief sought for by

the bill. The complainant must consequently specifically pray for such relief, otherwise the court will not interfere to assist him, unless the necessity for the injunction grows out of the proceedings, and not from the original situation of the parties (*a*). Hence it appears that an injunction partakes somewhat of the nature of a decree, because it involves the *rights* of the parties, and the ground of action; and it is from this amphibious character that its peculiarities arise. Thus the application for it must be by *motion*, as for an order; and also by bill, as for relief. Like a decree, too, it is decided on the merits, disclosed by bill and answer; and the order being special, notice of motion must be given on the coming in of the answer. This is the *ordinary* injunction. But as some occasions for an injunction are of so urgent a nature as that in waiting for the answer to be filed, irreparable mischief might in the mean time be done, the court will in such cases grant an injunction before answer, on the complainant's application, supported by an affidavit of merits. These are termed *special injunctions*.

As, however, the injunction to restrain unconscientious proceedings at law cannot stand in need of such expedition, it is never granted on

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(*a*) 1 Ves. & Beames, 314.

special application (*b*). But should the defendant in such case be in contempt for want of an appearance or answer; or even pray a *dedimus* or an order for time, or upon a demurrer or plea overruled, the injunction will be granted *as of course*, until answer *and* further order. This is called the *common injunction*, because obtained on common order. If, however, the defendant resides abroad, the application, even for the injunction to restrain proceedings at law, must be supported by an affidavit of the material facts alleged in the bill (*c*).

The effect of this common injunction is only to prevent the defendant (plaintiff at law) from taking out *execution*, if he had previously filed his *declaration*; in which case he might proceed, notwithstanding the injunction, through all the subsequent steps, up to *execution*. If in such case, therefore, the complainant desires to stay trial as well as execution, he must apply *specially* to the court to *extend* the injunction, on an affidavit that the discovery sought for in the defendant's answer is material, and that he cannot safely go to trial without it: nor will this be granted in the first instance, but must be grounded on the common injunction (*d*).

(*b*) 18 Ves. 522 2 Meriv. 476.

(*c*) 11 Ves. 567.

(*d*) 16 Ves 223. 2 Ves. and Beames, 11.

An injunction to stay proceedings after judgment, is never granted before answer, except on common order, for want of appearance or answer (unless where a warrant of attorney has been fraudulently obtained), because the parties ought to have applied sooner (*e*); nor can an injunction be obtained to prevent the sheriff's selling under an execution, unless an injunction has been previously granted against the defendant, to stay execution (*f*). The *common injunction* does not extend to stay proceedings in the spiritual courts, or courts of admiralty; but after the defendant is in contempt for want of appearance or answer, the court must be applied to *specially* to restrain proceedings in these courts (*g*), in order that it may ascertain the propriety of restraining their jurisdiction for want of competent authority to do complete justice.

The *common injunction* being always granted till answer *and* further order, cannot be dissolved until the defendant has answered, and cleared his contempts (if any); nor even then, in the first instance. The course is to move for an *order nisi* to dissolve it; and on the day fixed for shewing cause, it is argued on the merits.

(*e*) 3 Meriv. 225—6.

(*f*) 1 Mad. Chan. Prac. 132, and the MS. case there referred to.

(g) 1 P. Wms. 300—1.

It is a general rule, that affidavits contradictory to the answer, when filed subsequent to it, cannot be read; but there is an exception to this general rule, in the case of waste, and of injuries analogous to waste (*h*). The complainant, therefore, must rely upon the admissions in the answer, for shewing cause against dissolving the *common injunction;* or if the answer has been referred to a master, for impertinence or insufficiency, it is good cause, a defective answer being as none. In this latter case, however, the complainant must undertake to procure the master's report upon the impertinence, in a week; upon the insufficiency, in four days, or in default thereof, the injunction to stand dissolved without further motion (*i*). Nevertheless, if the exceptions are afterwards allowed, it is a *motion of course* to *revive* the injunction (*j*). Should the master report the answer sufficient, the injunction is *ipso facto* gone; but it is still competent for the complainant, by a special application, to revive it, on the merits admitted by the answer (*k*).

When an injunction is obtained or continued,

(*h*) 16 Ves. 49 19 Ves. 114—8; and *vide* 1 Swanst 252

(*i*) 14 Ves 531.

(*j*) 1 Dick. 292. Gilb For. Rom. 197.

(*k*) Gilb For. Rom. 197.

upon bill and answer, it remains in force until the hearing. But it happens in most cases of injunction (except to stay proceedings at law) that the delay consequent upon waiting for the defendant's answer, even when filed within the ordinary time, might be productive of irreparable mischief; as where the defendant is committing waste, or threatening an irremediable nuisance, or the like. In instances of this kind, the court, being *specially* applied to, will grant an injunction *immediately*, on certificate of the bill being filed, and an affidavit of merits; but such affidavit must distinctly allege the complainant's title, and the commencing or threatening of the injury sought to be prevented. If the application be made after the defendant has appeared, as this is a special order, notice must be given. But as the circumstances may be urgent, an *injunction ex-parte* will be granted before appearance, and even before the service of *subpœna* (*l*). There are some instances, where this writ has been granted in vacation, or between the seals, upon *petition* and affidavit, and certificate of the bill filed (*m*). These *special injunctions* are, by the terms of the order, to continue until answer, *or* further order; in which respect they differ from the common injunction, which remains in force until answer *and* further order. By this

(*l*) Amb. 66.

(*m*) 2 Ves. & Beames, 351.

it appears, that special injunctions may be dissolved at the option of the party, upon the answer coming in; or upon affidavit, before answer. They differ also from the common injunction, in another essential particular; namely, that upon the answer coming in, they do not require the order *nisi*, but may be dissolved by special motion in the first instance; nor, consequently, are exceptions to the answer cause for continuing them (*n*).

If a plea or demurrer be put in, an injunction cannot be obtained until their sufficiency is decided; because the court, until then, cannot judge whether it has cognizance of the cause (*o*). If, however, the demurrer or plea be overruled, the defendant will be placed in the same situation that he would have been in, but for such untenable defence (*p*). It is a frequent application, in such case, to have the demurrer or plea argued out of its course, because it prevents the injunction (*q*).

An injunction must be *served* personally on the defendant, by shewing him the writ itself under seal, and delivering him a true copy.

(*n*) Newl. Chan. Prac. 227.
(*o*) 3 P. Wms. 396.
(*p*) 3 Meriv. 225.
(*q*) 13 Ves. 167; and see Jones *v.* Taylor, 2 Madd. Rep. 181.

Under special circumstances, however, the court will substitute service on the attorney or solicitor (*r*); and in the case of a special injunction, where the party absconded, the court has ordered that service at the house which appeared to be his last place of abode, should be deemed good service (*s*). A *breach* of the injunction, on special motion and affidavit, is punished by committing the offender to the Fleet. Against peers, or members of the house of commons, in the like case, a sequestration will issue, in respect of their privilege.

The court of Chancery, in some cases, grants a perpetual injunction, which operates as a decree—as to quiet possession, and the like.

(*r*) Newl. Chan. Prac. 231. (*s*) 5 Ves. 147. 14 Ves. 205.

SECTION II.

Ne Exeat Regno.

The writ of '*ne exeat regno*,' was originally a writ to restrain one from leaving the kingdom without the king's licence, and used only for purposes of state; but it has since become a writ of right as between subject and subject, in matters of *equitable* cognizance, when it is apprehended that the party, against whom it is prayed, intends going out of the jurisdiction, and a debt is endangered thereby (*a*). It is not necessary in every case, in order to obtain this writ, that it should be prayed for by the bill; because it is not always, like an injunction, a part of the relief sought; and the necessity for it may arise subsequent to the filing of the bill. But it will not be granted, unless there is a cause in court. It is usual, however, to make the application for it, in the first instance, in the prayer of the bill; or at a later stage of the proceedings, to move for liberty to amend the bill for that purpose (*b*). This writ issues only on an *equit-*

(*a*) Curs. Can. 455.

(*b*) 2 Vern. 435, note 1; and vide 1 Ves. & Beames, 129, 371.

able demand; with the exception of a decree for alimony, where it issues for the arrears, but for those only, and costs; the reason for which is, that the spiritual court has no authority to enforce its decrees (*c*).

The order for a '*ne exeat regno*' is obtained either by motion or petition, supported by an affidavit, which must be *positive* both as to the amount of the debt sworn to be due, and as to the defendant's intention of going abroad. It must not be a debt for which the defendant is liable to be arrested at common law, unless it be on matter of *account*, for here equity has a concurrent jurisdiction: and in this latter case, an affidavit as to *belief* of the amount will be sufficient; because it might be impossible to swear positively to a sum due at foot of an unliquidated account (*d*). If the amount of the sum appears by the master's report, no affidavit to that fact is necessary (*e*). In like manner, it is not enough for the complainant to swear that *he believes* the defendant intends leaving the kingdom, but he must state some declaration on

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(*c*) 2 Atk. 210. Where the reason assigned by Lord Hardwicke is, "out of compassion to the wife, and to aid the spiritual court." And *vide* 7 Ves. 171, 173, 410. 14 Ves. 261.

(*d*) 3 Atk. 501. 8 Ves. 593. 10 Ves. 165.

(*e*) 18 Ves. 353.

his part to that effect, or some clear circumstance evidencing his design (*f*). An admission in the answer will be sufficient for that purpose, without an affidavit (*g*).

The writ is usually directed to the sheriff, and commands him to cause the party to give a sufficient security (a bond with sureties, in a penalty double the amount of the sum sworn to be due, and which is marked on the back of the writ), that he will not go, or attempt to go out of the jurisdiction, without the leave of the court; otherwise to commit him to prison. No *subpœna* is sued out along with this writ, although it is always prayed for; but the defendant, on being personally served with the writ, is bound to appear and answer (*h*). If he be arrested by the sheriff, he must give fresh security to the Master of the Rolls; which is equivalent to the '*bail above*' at common law.

The terms of the order are, until '*answered*, AND *further order*.' When, therefore, the defendant has appeared and answered, he may, upon notice, move to *discharge* the order, which

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(*f*) 7 Ves. 417. 11 Ves. 54. 18 Ves. 355.

(*g*) 6 Ves. 95.

(*h*) 5 Ves. 96—9, and Reporter's note.

is usually granted on his entering into a recognizance with the master, to abide the event of the suit; or on his paying the money into court(*i*). If the defendant, by his answer, or even by *affidavit* before answer, denies the equity, on hearing counsel on both sides, the writ may be *superseded* (*j*); but the distinction appears to be, that an affidavit cannot be read against an affidavit, though the answer may.

SECTION III. (*a*)

Certiorari.

If one be sued in an inferior court *of equity*, whose jurisdiction is limited, the party so sued may file a bill in Chancery, to have the plaint and proceedings in such suit removed to this court, upon a *suggestion*, that either from a defect of authority in the inferior court, or some other adequate cause, equal justice cannot be done there. This bill is called a '*certiorari bill*,' from the *writ* which it prays, and which is

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(*i*) 3 Bro. C. C. 218. Ves. & Beames, 133, 373.

(*j*) Curs. Can. 456.

(*a*) Vide 1 Madd. Chan. 182.

the only prayer contained in it. The writ of *certiorari* is directed to the judge of the court below, requiring him to *certify*, or send to the court of Chancery, the bill or plaint, and all proceedings thereon. The order for this writ is obtained on motion, and a certificate of the bill filed; but before the writ is made out and delivered, the complainant in the *certiorari* bill must enter into a bond, with a surety, to the Master of the Rolls, in a penalty of 100*l.* to prove the *suggestions* of his bill within fourteen days after the return of the writ. This time may afterwards be enlarged, on special motion, and good cause shewn. The writ itself is returnable in fourteen days after service of it on the defendant; and when returned will, on motion for that purpose, be filed, together with the proceedings removed.

The interrogatories to prove the suggestions, are filed with the examiner, and the witnesses are examined by the complainant only, the defendant having no permission to rebut their testimony. An order is then obtained to refer the examination to a master; and if he reports the suggestions of the bill to be proved, the court may be moved on such report to have the bill retained. On the other hand, if the master certifies that the suggestions are not proved, a '*procedendo*' may be applied for, which is a

writ directed to the judge of the inferior court, desiring him to proceed in the cause which was sought to be removed. When a *certiorari* cause is brought on to a hearing, the court may, if it think proper, and frequently does, send it back to the inferior court to be determined (*b*).

(*b*) 2 Vern. 491.

CHAPTER VII.

OF AMENDING THE BILL, AND FURTHER ANSWERS.

HAVING, in the preceding chapter, treated of interlocutory orders in general, and given a distinct consideration to those which must be prayed for in the bill, and whence it usually derives its denomination, as an 'injunction bill,' or a 'certiorari bill,' let us now revert to the situation of the parties, and the position of the suit, when the bill and answer are both filed. On perusing the answer, the complainant, as has been formerly stated, may discover that his own bill has been defective for the purpose of drawing a full answer from the defendant, or bringing the matter of complaint fairly before the court; in which case he moves to *amend* his bill: or he may find that the defendant has not put in a *sufficient* answer, having either evaded or passed over some of the positions of the bill; or perhaps the answer may contain *scandal*, or *impertinent* matter; in either of which events he

takes *exceptions* to such answer, and moves to refer the bill, answer, and exceptions, to a master, for his judgment thereon. These, though merely incidental circumstances, yet are of such frequent occurrence, that we cannot wholly omit the consideration of them in a review of the proceedings in this court.

SECTION I.

Of amending the Bill.

The complainant is, at all times before he files his replication, at liberty to amend his bill, as a matter of course, and even without costs, if he does not thereby put the defendant to any additional expense. In the other alternative, however, as where the defendant is obliged to put in a further answer to such amendments, or to take out a fresh copy of the bill; the order to amend is only granted on payment of 20*s*. costs. On the same principle, if the defendant has put in a defective answer, to which the complainant excepts, he may amend his bill without costs, and obtain an order to have the amendments and exceptions answered at the same time; because a defective answer is as none; and the

further answer is in this case rendered necessary by the defendant's own default.

The amendment of a bill puts an end to all process of contempt, which may have been sued out against the party; because an original and amended bill are one and the same record; and therefore, when the bill is perfected by amendment, the proceedings must be commenced '*de novo*.' This rule is carried to the extent of where even the amendments are only the addition of necessary parties (*a*). For the same reason, in an 'injunction bill,' after the injunction is obtained on the merits, the order is not of course, to amend the bill, but the complainant must make a special application to the court to amend his bill, *without prejudice* to the injunction (*b*); for which also there seems to be this additional reason, that since the injunction is allowed upon the merits disclosed upon bill and answer, the court will not permit the subsequent addition of any new matter, without taking such new matter into cognizance, because it might possibly affect the reasons on which the injunction was founded. The injunction will not be granted after amendments to an original injunction bill, unless there is a

(*a*) 2 Cox, 411. 2 Sch. & Lefr. 516. 2 Ves. 21.
(*b*) 2 Ves. & Beames, 331.

positive affidavit, that the facts stated in the amendments were not sooner known to the complainant (*c*). Upon the principles above stated, an order to amend, without prejudice, will not be granted, in the case of the common injunction (*d*). Special injunctions, being granted on affidavit, are not within the rule.

After the replication is filed, as we shall see further on, the pleadings on the part of the complainant are concluded, and issue is joined in the suit; consequently no substantive amendments can be admitted after that period, for that would be to open the pleadings a second time: but even then, under special circumstances, the complainant will obtain leave to withdraw his replication, in order to add an amendment. This indulgence, however, will not be granted after the publication of the depositions; for it would be unjust to permit the complainant to put new facts in issue, when he should happen to find that those on which he originally relied were not substantiated. In such case, his only proceeding is to file a supplemental bill; which we shall notice subsequently.

But an amendment, by merely adding new

(*c*) 3 Ves. & Beames, 144, 145.

(*d*) 2 Ves. & Beames, 330 3 Madd. Rep. 470.

parties, will be permitted at any time, even at the hearing of the cause (*e*); for none are bound by the decree, but those who are parties to the suit; and it is sometimes difficult to ascertain who are necessary parties to make a decree effectual, many of them being merely collateral. But when the bill is for a discovery merely, an amendment, by adding parties, will not be allowed (*f*); because, as such bill does not seek a decree, no objection can be raised to it for want of proper parties. When such parties are added after publication, they must be heard on bill and answer only; for the court will not permit new evidence to be adduced after trial, which in Chancery is closed by the publication of the testimony.

The amending a bill, after a plea or demurrer put in, is an admission of their validity. And if the liberty to amend be obtained before the plea or demurrer be set down for argument, only 20*s*. costs are incurred; but when the amendment is made after they are set down, the complainant must pay full costs. When a plea or demurrer to the *whole* bill is allowed upon argument, the bill is out of court, and no amendment will then be permitted.

(*e*) 1 Atk. 51. 3 Atk 370. 1 Atk 289.

(*f*) 2 Meriv. 74

If a bill is amended after a *full* answer has been put in, and a further answer is required to the amendment, it is necessary to sue out a fresh *subpœna* for that purpose (*g*). But if, after exceptions to the answer are allowed, or submitted to, the bill is amended, and the complainant obtains the usual order, that the amendments and exceptions shall be answered together, a new *subpœna* is not requisite. Where a further answer is not demanded, the practice is, that on service of the order to amend, the defendant must bring his office copy to the complainant's clerk in court, to be amended; and *he is at liberty* to put in a further answer within eight days after service of the order, before which time the complainant cannot file a replication (*h*). When the complainant has obtained an order to amend after answer, and neglects so to do, the defendant may, after three terms, move to discharge the order, and at the same time to dismiss the bill in the usual manner (*i*).

(*g*) *Vide* Newl. Cha. Prac. 197; and the case of Pennington *v.* Lord Muncaster, cited in the note.

(*h*) Hinde, 25.

(*i*) *Vide infra*, p. 107.

SECTION II.

Of Exceptions to the Answer.

When the defendant answers evasively, or omits altogether to answer any of the material points of the bill, the course is, as has been already observed, to take exceptions to such defective answer. The exceptions must be in writing, and state the precise points in the bill unanswered, or imperfectly answered; and they are likewise to be signed by counsel, who thereby vouches for their propriety.

After the exceptions have been drawn, they are to be filed; which is done by the complainant's clerk in court delivering them to the clerk in court of the defendant, at the same time marking them at the top with the day and year when delivered. If the answer has been filed in term time, the exceptions should *regularly* be filed the same term, or eight days afterwards: if the answer be filed in the vacation, the complainant has till eight days after the commencement of the ensuing term to file his exceptions(*a*).

(*a*) Beames' Ord. Chan. 181.

But though this is the ordinary time allowed, it is a motion of course, for liberty to file exceptions '*nunc pro tunc*,' if the application be made within the two next terms and the following vacation (*b*). Nor is the rule different in the case of a mere bill of discovery: although formerly thought otherwise, because, in a suit instituted for discovery only, the answer terminates the proceedings (*c*). After the period above mentioned, the court will only grant such order under peculiar circumstances (*d*). If there be separate answers, each deficient in the same particular, separate exceptions must be taken to each answer.

When the exceptions are once filed, the court is very strict, and will not allow new ones to be added (*e*). So, exceptions cannot be regularly taken after an amendment, although the court will sometimes permit the complainant to amend, without prejudice to exceptions (*f*); but the course is, as we have seen, to except first, and on the exceptions being allowed, to move to have the amendments and exceptions answered together. In like manner, no exceptions can be

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(*b*) 6 Ves. 823.

(*c*) See Baring *v.* Prinsep, 1 Madd. Rep. 526.

(*d*) 3 Atk. 19. 14 Ves. 536.

(*e*) 11 Ves. 575, 580.

(*f*) 12 Ves. 458.

taken to an answer after the replication is filed; for by the replication, its sufficiency is admitted: yet here also, in some cases, the court has ordered the replication to be withdrawn, and permitted exceptions to be filed (*g*).

A defendant has eight days after the complainant has filed his exceptions, to make his election, whether he will submit to answer them or not. If he submit to put in a further answer, he must pay the complainant 20*s*. costs, before such answer will be accepted; and in default of answer, the usual process issues against him. On the other hand, if the defendant is advised that he has answered all that is material, and means to dispute the validity of the exceptions, he puts the complainant upon procuring an order of reference to the master, who makes his report thereon, in the manner described in a former section. If the master reports the answer sufficient, the complainant pays 40*s*. costs; if he allows the exceptions, the defendant must pay a like sum; or 50*s*. if it be a country cause. For a second answer, reported insufficient, the defendant must pay 3*l*.; 4*l*. for a third; and if he puts in a fourth imperfect answer, he pays 5*l*. and the complainant having filed the master's

(*g*) Harr. Chan. Prac. 197.

report, may move to have him committed, and examined on interrogatories (*h*). The party who becomes entitled to the costs in the above mentioned cases, sues out a *subpœna* for costs against the opposite party, which must be served personally; and such costs are made payable to the bearer on demand. On a second reference for insufficiency, new exceptions cannot be added; but if there have been amendments, there may be new exceptions, as to the answer to such amendments.

The complainant, it has been observed, cannot refer exceptions to a first answer, until eight days after they are filed; but upon a second, and subsequent insufficient answers, they may be referred immediately. A first answer may also be referred immediately in an *injunction cause*, where dispatch is required (*i*). But beyond the eight days, he is not restricted to any particular time for referring the exceptions, for it is his own loss if he neglects or delays to do so; and the defendant may, at any time, obtain an order on his part for a reference, and so have the matter decided.

Exceptions cannot be taken to an infant's an-

(*h*) Beames' Ord. Chan. 182, 317.

(*i*) Newl. Chan. Prac. 185, and the MS. case cited in the note.

swer, because he is not bound by it, but may amend it when he comes of age (*k*) : nor to the answer of the Attorney-General (*l*).

It is to be observed, likewise, that in case of a defendant pleading or demurring to part of a bill, and answering to the residue, if the complainant take exceptions to the answer, before the plea or demurrer has been argued, he admits the plea or demurrer to be good ; for unless he acknowledges their validity, it would be impossible to determine whether the answer is sufficient or not (*m*). If the plea or demurrer be in such case overruled, he must then take exceptions to the answer for insufficiency, in such parts as were attempted to be covered by the plea or demurrer : but where the demurrer or plea had been to the whole bill, there is no necessity for exceptions ; because when such are overruled, no answer remains ; and the defendant is bound by the original process to answer in due time.

When the exceptions are either allowed or

(*k*) 1 Ves. jun 494. 4 Bro. C. C. 256. 13 Ves. 27. and the cases cited in the note.

(*l*) Madd. Chan. Prac. 346,

(*m*) Mitf. 256.

submitted to, the defendant must put in a *further answer*. So, likewise, if there are amendments added to the bill, after a full answer. There is this difference, however, between a *further answer* after exceptions, and a *further answer* to an amended bill; that as the former is rendered necessary by the defendant's own act, a new *subpœna* to answer is not required, it being sufficient to give the defendant a rule to answer (*n*); and the court will, *as of course*, grant but one order for time, either in a town or country cause (*o*): in the latter instance, as we have already seen under the head of Amendments, a new *subpœna* is necessary when a further answer is required; and the defendant is entitled to the usual orders for time, as for the original answer: and even though a further answer to the amendments should not be called for, yet still the defendant *is at liberty* to answer, and take the common orders, if he thinks proper, before the complainant can proceed with his suit (*p*). A further answer is similar in all its incidents to, and is considered as forming part of, the original answer.

(*n*) Beames' Ord. Chan. 250—1, and the note.

(*o*) Hinde, 261.

(*p*) *Ante*, p. 86.

SECTION III.

Of References for Scandal and Impertinence.

An answer also may, in like manner as a bill, be referred for *impertinence* or *scandal*; and if the master reports accordingly, an order is obtained to send it back to the master, to expunge the irrelevant or offensive matter, and to tax the party his costs. It is to be observed, that no reference can be had for impertinence, after exceptions taken for insufficiency, for such would be a vexatious and incompatible proceeding (*a*); but, on the other hand, after an answer has been reported impertinent, exceptions may be taken for insufficiency; and the time for filing such exceptions is regulated by the date of the master's report, and not from the time of filing the answer (*b*). If, pending a reference for impertinence, the complainant files exceptions for insufficiency, he waives the former objection (*c*).

For the reason stated in the preceding section, there cannot be a reference for impertinence

(*a*) 6 Ves. 458.
(*b*) 1 Meriv. 1.
(*c*) 6 Ves. 458.

after the replication is filed; but it is otherwise with respect to scandal, which may be referred at any period; because the court is anxious to have the records of its proceedings pure and untainted (*d*).

By a general order, all references of answers for insufficiency, or for scandal and impertinence, made in the same cause, must be made to the same master; and where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the court shall afterwards refer the same for insufficiency, the latter reference is to be made to the same master as on the former reference (*e*).

(*d*) 2 P. Wms. 312, in the note.

(*e*) 10th March, 1818. *Vide* 3 Madd. Rep. 317. 1 Swanst. 28.

CHAPTER VIII.

OTHER INTERLOCUTORY APPLICATIONS.

SECTION I.

Of paying Money into Court, and of the Appointment of a Receiver.

THERE are two other interlocutory applications on the part of the complainant, which, from their frequency, and because they are connected with the matter of the suit, deserve to be noticed in this place; *viz.* for the payment of money into court, and the appointment of a receiver. They are both founded on the same principle, namely, where a party admits, either by answer or affidavit (*a*), or it appears by the master's report (*b*), that he has property in his possession, to which the person making the application has some claim, but that the distinct interests of the several claimants cannot be ascertained, without the assistance of the court.

(*a*) 6 Ves. 736. (*b*) 3 Ves. 572.

If the property in question be a gross sum of money, the party is directed to pay it into court on a certain day named in the order (*c*); and if the order is not complied with, a writ of execution issues. But if such order be obtained against a person who is not a party to the suit, on his disobedience, the practice is to move for a second order, that he shall pay it by another day, or stand committed.

When the property in litigation consists, not of a gross sum, but of income, as the rents and profits of land, or the profits and produce of any other species of property, a receiver is appointed. But a party, to be entitled to move for a receiver, *before decree*, must have a prayer to that effect in his bill (*d*). A receiver is an officer of the court; for which reason no ejectment can be brought against him without the leave of the court, nor can he bring one without its authority (*e*). If a person sets up a claim to the estate, he may be ordered to come in and be examined '*pro interesse suo*,' as in the case of a sequestration (*f*).

The appointment of a receiver is referred to

(*c*) 8 Ves. 381.

(*d*) 3 Atk. 690.

(*e*) 3 Bro. C. C. 88. 9 Ves. 336. 6 Ves. 288.

(*f*) 1 Ves. jun. 85. 2 Dick. 472.

the master that he may consider of a proper person to discharge the office. For that purpose a proposal of some fit person is laid before him, together with two sureties for his proper conduct. Neither a solicitor (*g*) in the cause, nor a trustee (*h*), nor a *prochein ami* (*i*), are eligible, on account of their privity and connection with the matters in dispute; nor can a peer (*j*) be appointed, because the court could not have sufficient controul over him. The person appointed receiver, and the sureties, must enter into recognizances that he shall duly pass his accounts annually before the master (*k*), and pay in his balances on the days fixed on by the master for that purpose. In default thereof, the receiver not only loses his salary, but is charged 5 per cent. per annum on the balances in his hands (*l*). If an order has been obtained against a receiver who has neglected to pay in his balance, and he still fails to do so, either the recognizances may be put in suit, or he may be committed; but, in the latter case, a previous order must be had that he should pay by a certain day, or stand committed (*m*). When

(*g*) 2 Ves. jun. 137. 2 Meriv. 452.

(*h*) 8 Ves. 72.

(*i*) 2 Madd. Rep. 64.

(*j*) 2 Ves. & Beames, 208.

(*k*) Beames' Ord. Chan. 454.

(*l*) *Ibid.* 462. 15 Ves. 273.

(*m*) 14 Ves. 143.

the master has certified to the court that the receiver has duly passed all his accounts, the recognizances will be vacated; previous to which the sureties will not be discharged (*n*).

All sums of money ordered to be paid into this court, must be lodged in the Bank of England, to the credit of the cause, with the privity and in the name of the Accountant General, who is an officer created by the 12 Geo. 1. for that purpose. Any of the parties to the suit may apply by motion or petition to have such money laid out and invested in government securities, for the benefit of the parties interested in the cause. When a sum of money is paid into the Bank, a certificate thereof is filed in the Report Office by the Accountant General, and an office copy taken by the solicitor. This certificate is afterwards requisite for persons applying to receive money out of court, either by order or decree.

And this concludes our head of Interlocutory Orders, which it was thought convenient to insert in this place; as well to lead the student regularly through the order of the proceedings, as to make him acquainted with the terms of art, which being unknown, might render other

(*n*) 2 Ves. 401.

parts of this work, in which they occur, either unintelligible, or at least difficult to be comprehended. The examples given have been selected with that view, and are put as illustration merely; it being impossible to enumerate all the orders which are made in the course of practice, they being as various as the circumstances on which they are founded.

SECTION II.

Of putting the Complainant to his Election.

Before, however, we enter upon the regular course of the suit, it will be necessary to advert to one more incidental proceeding, which is taken whenever a complainant thinks proper to sue for one and the same matter, both in law and equity at the same time, where both courts have a concurrent jurisdiction. In such case, as this court will not suffer a defendant to be harrassed by two proceedings for the same cause, he will obtain, *after* his answer has been duly filed, an order, as of course, to put the complainant to his *election*, either to proceed at

law, or in equity (*a*). But the complainant is entitled to a complete answer before he can be put to his election; because he has at all times a right to discovery in this court, though not to relief, if he chooses to seek it elsewhere. For this reason, the common order will not be granted until the time for filing exceptions has expired; and if there be exceptions, not until they are answered, or the answer reported sufficient (*b*). A plea being an excuse for not answering, is of course not an adequate ground for the common order (*c*).

After the order to make an election is served on the complainant's clerk in court, he has eight days wherein to make his election. If he elects to proceed at law, or in default of such election within the time prescribed, his bill will stand dismissed, with costs (*d*). If he elects to proceed in equity, by the terms of the order an injunction issues to stay his proceedings at law. A party may move to discharge the order putting him to his election, and insist that it was obtained upon a false allegation, that the suits are for the same matter; and if the court has

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(*a*) 3 Atk. 558. Gilb. For. Rom. 114.

(*b*) 3 Madd. Rep. 24.

(*c*) 3 Meriv. 45.

(*d*) 3 P. Wms. 90.

any difficulty in determining whether they are so or not, then a reference to the master is directed, and all proceedings are stayed in both courts in the mean time (*e*). The election is filed in the report office, and signed by the complainant's clerk in court.

(*e*) 3 Ves. and Beames, 9. 1 Ves. and Beames, 381.

CHAPTER IX.

OF JOINING ISSUE, AND OF DISMISSING THE BILL.

SECTION I.

Of hearing upon Bill and Answer.

HAVING now followed the progress of the suit through all its intermediate and incidental steps, we next come to consider whether the cause in its present stage be ripe for hearing. This will depend upon whether there be sufficient matter *confessed* in the defendant's answer, upon which to ground a decree. If the complainant chooses to rest his case upon the admissions in the answer, and there be sufficient to warrant the judgment of the court, the cause may be set down for hearing upon bill and answer only; but in this case the answer must be admitted to be true in all points; and no other evidence will be allowed, unless it be matter of record to which the answer refers, and which is proveable

by the record. Therefore, in many instances, where the answer confesses, and avoids by new matter, it will be prudent for the complainant to reply, even though he require no witnesses on his part, in order to put the defendant upon the proof of his answer. A defendant to a bill brought by an infant, must always prove his answer, even though the infant do not reply; because, the interest of an infant is under the peculiar protection of the court, and he is not bound by an admission (*a*).

If the complainant go to hearing on bill and answer, and the court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the bill will be dismissed with costs; or the complainant may be admitted to reply, on paying down five pounds (or such other costs as the court shall think fit for the day) within four days after such hearing; which if he fails to do, the dismission must stand; and being signed and enrolled, may be pleaded in bar to a new bill for the same matter (*b*). "The complainant is therefore to be well advised that the court be not put to an unnecessary trouble, and himself

(*a*) 2 Atk. 377, but see 3 P. Wms. 237, note (*a*); and *vide* 3 Ves. and Beames, 20.

(*b*) Hinde, 417.

to a certain charge, in bringing his cause to hearing, which will not bear a decree (c)."

SECTION II.

Of the Replication and Rejoinder.

Our next enquiry, therefore, will be, what are the steps necessary to be taken in order to put the cause in such a situation as that a full decree may be pronounced. If the deficiency lies in the complainant's bill, the course is, as we have already seen, to obtain an order to amend it. If, on the other hand, the complainant can prove the facts stated in his bill, though not admitted, or even denied by the defendant; or if he has reason to doubt the truth of the defendant's statement in his answer, he proceeds to take issue; which is done by the pleading called a *replication*, to which the defendant '*pro formâ*' rejoins; and thus both parties are put upon the proof of their respective allegations, so far as they are not admitted on the other side.

(c) Beames' Ord. Chan. 180

The replication is now nothing more than a general reply to the defendant's answer, averring the bill to be true, certain, and sufficient, and that the answer is directly the reverse, all which the complainant is ready to prove, as the court shall award; upon which the defendant rejoins, averring the like on his side, which is joining issue upon the facts in dispute. Formerly it was the custom to reply specially to the defence, which produced in turn special rejoinders, and the whole train of special pleading, with all its niceties with regard to departures, &c. as at common law; but since the practice of permitting the complainant to amend his bill, and requiring a further answer to the amendments, has been adopted, special replications have fallen into disuse, which has materially shortened and simplified the pleadings in this court. The replication and rejoinder are at present, therefore, little more than common forms, the former tendering, and the latter joining issue, by means of which the pleadings are closed, preparatory to the parties examining their witnesses. And, indeed, the rejoinder is never actually filed, the defendant either appearing 'gratis' to rejoin, or his clerk in court being served with a *subpœna* returnable *immediate* for that purpose, which is equivalent to a notice of the complainant's intention to dispute the facts. The replication, however, being the ground-work of such *sub-*

pœna, must be regularly filed before the return (*a*).

If the facts of a plea are intended to be disputed, the same formal replication is to be used; and where there is a plea, and an answer in support of it, the complainant must reply to both (*b*), that the defendant may have the benefit of proving his answer in support of his plea; the validity of which, in law, is admitted by replying to it. The replication being, as we have observed, mere matter of form, need not be signed by counsel.

It is to this point that a person who files an *interpleading* bill is obliged to carry the suit, leaving the several claimants (who are made defendants) to adjust their demands by making proof of their rights (*c*). The replication is in the usual manner of other pleadings, engrossed on parchment, and filed with the six-clerk.

(*a*) Beames Ord. Chan. 109, 183.

(*b*) 2 Vern. 46. Hinde, 289.

(*c*) Dungay *v.* Angove in Cha. 19th July, 1791. 2 Ves. and Beames, 407.

SECTION III.

Of Dismissing the Bill for want of Prosecution.

The replication must be filed within three terms after the answer, exclusive of the term in which the answer was filed, otherwise the bill is liable to be dimissed for want of prosecution, unless some step in the cause has been taken in the mean time; as an order to amend the bill, or to refer the answer, and the like (*d*). And in general, when a complainant suffers three terms to elapse, at any stage of the proceedings, without moving forward in the cause, where it rests *solely* with him to do it, his bill may be dismissed for want of prosecution; which is in the nature of a nonsuit at law. But it is otherwise if the defendant may himself proceed; as after a demurrer, or a plea filed (*e*), though not set down to be argued, he cannot move to dismiss the bill, because the plea or demurrer may be set down for argument on the defendant's petition as well as the complainant's. So also, after pub-

(*d*) Beames' Ord. Chan. 11, and *vide* 3 Ves. and Beames, 171, where the alteration in the practice is noted; and 2 Madd. Chan. Prac. 384, note (*l*).

(*e*) 2 Ves. jun. 287. Barnard. 287.

lication is passed, the cause may be set down for hearing '*ad requisitionem defendentis*,' and will not therefore be dismissed for want of prosecution. Where the bill is for discovery merely, and consequently there is no proceeding beyond the answer, the course is to pray for an order that the complainant shall pay the defendant the costs of the suit, to be taxed (*f*).

There is an important difference, however, between the application to dismiss a bill made *before*, and that which is made *after* the replication filed. The former is a motion of course (*g*), and the order is obtained upon merely producing the six-clerk's certificate. However, under special circumstances, supported by affidavit, the court will discharge the order, and permit the complainant to amend his bill upon payment of costs (*h*); and in such case he must take care to amend within a reasonable time, or the order will be considered as a nullity (*i*). The latter, namely, the order to dismiss subsequent to the filing of the replication, is only obtained upon special motion; and here, if the complainant undertakes to 'speed his cause,' he is given another term only, and not *the vacation follow-*

(*f*) 1 Atk. 286.

(*g*) 15 Ves. 291.

(*h*) 16 Ves. 204. 3 Ves. and Beames, 1. 2 Atk. 604.

(*i*) 1 Ves. & Beames, 523.

ing (*j*); but if he still neglects to follow up his suit, the defendant may, upon special motion, on the production of the former order, together with the six-clerk's certificate, obtain a peremptory order for the dismission of the bill with costs, *unless* the complainant appears and undertakes to give rules to produce witnesses, and to pass publication in the course of the ensuing term, and to set down the cause for hearing in the term after; so anxious is this court not to send any suitor away without redress, even where his own negligence is the cause. But if the above condition is not complied with, the cause stands dismissed out of court without further motion. A complainant (though only a co-plaintiff (*k*)) may move to dismiss the bill, so far as he is concerned, at any period of the suit, upon payment of costs (*l*).

(*j*) *Vide* 2 Madd. Chan. Prac. 387, note (*b*).

(*k*) 13 Ves. 167.

(*l*) 1 Cha. Ca. 40. 3 Atk. 558.

CHAPTER X.

OF THE EXAMINATION OF WITNESESS.

THE *subpœna* to rejoin, or rejoining *gratis*, puts the cause completely at issue between the parties; and to prove the facts alleged by the pleadings on each side, is the next concern. This is done by examination of witnesses, and taking their depositions in writing, according to the manner of the civil law; and which depositions are kept secret until the time for examining witnesses has expired; at which period either party may give a rule to have the examination disclosed, which is called '*passing publication.* Our present enquiry, therefore, will be with regard to the examination of witnesses, and the manner of taking their depositions.

SECTION I.

Of the Examination by the Examiner.

The examination takes places in either of two ways, *viz.* at the examiner's office, if the witnesses reside within the circuit of twenty miles from town; or before commissioners specially appointed, for such as live beyond that distance. Anciently all examinations were taken by the Master of the Rolls in person, upon the allegations of the bill; and the answers of the witnesses were set down in writing: but afterwards, as the business of the court increased, and the Chancellor began to depute the Master of the Rolls to hear some of the minor causes, the business of examination fell into the hands of two of the sworn clerks of the Master of the Rolls, thence called examiners. It was thought, however, too much to entrust them with the discretion as to what questions were proper to be put: and from that time forward the custom arose of framing and filing *interrogatories* in writing, on behalf of either party, which, and which only, are to be proposed to, and asked of, the witnesses in the cause (*a*). This being an

(*a*) *Vide* Jud. Author. of Master of the Rolls

important branch of the proceedings, great care and skill being required that the interrogatories be short and pertinent, and not leading (as otherwise the depositions upon them will be suppressed), at the same time that they be adapted to sustain the case of the party on whose behalf they are filed, they must be drawn up and signed by counsel.

The manner of examining the witnesses upon such interrogatories has been regulated by a variety of rules and orders of the court, issued from time to time, the main object of which is to provide that the examination shall be fair and impartial, and without allowing any undue advantage to be taken on either side (*b*). When either party chooses to examine witnesses, therefore, in town, the interrogatories, properly ingrossed, are first to be left with the examiner, at his office, which is the mode of filing them; and the clerk in court enters a rule for the other side to produce witnesses. When a witness attends to be examined, he is taken before a master and sworn; and the '*jurata*,' with the date of it, is inscribed on the interrogatories, and signed by the master. The witness is next produced in person, previous to his examination,

(*b*) Beames' Ord. Chan. 183, *et seq.* 71, 262.

and shewn at the seat of the adverse clerk in court, in the six-clerks office; and a note in writing, of his name and place of abode, left with the clerk. This is with the view, as well to give an opportunity to the other side of cross-examining the witness, as also to ascertain and ensure his personal identity. Being thus sworn and produced, he returns back to the examiner's office, and is there examined privately; none being present but the witness, the examiner, and his clerk. Each interrogatory is to be proposed to him '*seriatim*'; and he is not, on any account, to be permitted to read over, or hear read, any other interrogatory, until the one in the course of examination be concluded, and his deposition taken thereto. Scandalous and impertinent answers are not to be taken down; and such answers would be suppressed after publication. After the witness has been fully examined, the depositions are read over to him, which he is then at liberty to amend or alter: he next signs them, when, and not before, the examination is complete, and good evidence to be read at the hearing.

In like manner, all letters, notes, deeds, *copies* of records, and such like, when proved by the examination, may be read at the hearing; and such are technically called *exhibits*; because, though they stand proved in the depositions,

they must be *exhibited* in court, if the party will have any benefit of them in evidence. Sometimes *exhibits* are allowed to be proved *vivâ voce* at the hearing, provided no cross-examination be necessary (*c*); but then there must be an order obtained for that purpose, and the *exhibits* to be proved must be specified in the order (*d*). There is an exception, however, with regard to a will, which cannot be thus proved, because the due execution of it may come in question, which cannot be examined to '*ore tenus*' in court (*e*).

If the opposite party thinks proper to cross-examine any witness who is produced, he may do so, having filed cross-interrogatories, and left a note with the examiner for that purpose; and then the witness is to be examined on the cross-interrogatories, immediately on his direct examination being closed; otherwise the party, whose witness he is, is not bound to produce him again.

Witnesses in this court are compelled to at-

(*c*) 2 Ves. 479, 480. 1 Atk. 445.

(*d*) In the Curs. Canc. 306, it is said, that this order must be special; but *vide* Newl. 285, *contra*. It is also said, that letters and notes cannot be proved *vivâ voce*.

(*e*) 3 P. Wms. 93. 1 Atk. 203.

'tend, by the same process as in the common law courts; namely, the '*subpœna ad testificandum*;' and in default of attendance, upon certificate of the interrogatories being filed, and affidavit of personal service, the court will order the witness to appear within four days to be examined, or commit him to the Fleet (*f*).

No witness can ever be examined twice to the same point; but new interrogatories, either for the same or different witnesses, may be filed in *the examiner's office*, at any time before publication is passed: but if it be the same witnesses who are required to be examined on fresh interrogatories, an order must be obtained for that purpose. Sometimes, though rarely, a witness is permitted to be re-examined on the same interrogatories, to give him an opportunity to answer more fully and precisely to some point; but in such case, he is strictly confined to the particular point, and must not be examined at large (*g*).

A defendant also may, in some instances, be examined as a witness; that is, provided it be only to points in which he is not concerned in

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(*f*) Hinde, 329. 12 Ves. 201.

(*g*) 13 Ves. 280.

interest (*h*); consequently, if he be examined at the instance of the complainant, the complainant cannot have a decree against him on such matters as he has been examined to (*i*). Liberty to examine a defendant must be obtained by order, which is of course, and which always contains a clause, saving just exceptions to the other side. Nor is it the complainant alone, who has the power to examine a defendant as a witness; but a co-defendant may do so likewise, under the same restrictions: otherwise, if the being a party were to exclude the testimony, any man might deprive another of his defence, by making his most material witness a co-defendant (*j*). It is different, however, in the case of complainants, one of whom cannot examine another, both because they stand voluntarily in that capacity; and because they are all so far interested, at least, as to be liable for the costs, if the suit miscarry. Yet a defendant may examine a complainant, if he consent to have interrogatories put to him (*k*).

If interrogatories be improperly exhibited to a witness, he must demur (*l*); and such demurrers

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(*h*) 2 Ves. & Beames, 401, P. Wms. 288. 16 Ves. 219.

(*i*) 3 Dow. Rep. 153. 1 Cox, 344. Ambl. 583.

(*j*) 1 P. Wms. 596. 3 Rep. 265.

(*k*) 15 Ves. 173.

(*l*) 2 Atk. 593. 1 Madd.

are set down like other demurrers for argument, but are held to very strict rules (*m*). A witness, however, cannot demur to being examined, because the question is not pertinent to the matter in issue (*n*). He may object also to any question, which can have a tendency to criminate him, or render him liable to any penalty (*o*). And the mode of proceeding in such latter case, is to state in the depositions, that to such an interrogatory the witness refuses to answer; and the reason of his objection.

If a witness, residing within twenty miles of town, be in prison, or incapable, from sickness, of attending, one of the examiners and the sitting master will go to him, to swear him, and take his depositions; previous notice being given of the time and place, to the other side, to give them the opportunity of cross-examining.

(*m*) Mos. 195. 2 Atk. 524. 2 Chan. Ca. 208.

(*n*) 1 Vern. 165.

(*o*) 16 Ves. 239.

SECTION II.

Of the Examination by Commissioners in the Country.

In a country cause, that is, where the witnesses reside above twenty miles from town, the examination of witnesses is by *commission*, issued under an order of course obtained for that purpose, and which in general constitutes part of the order for a *subpœna* to rejoin. The application in that case is for 'a *subpœna* to rejoin, returnable immediately; and that service on the defendant's clerk in court, may be deemed good service; and that the complainant may be at liberty to take out a commission for the examination of witnesses, returnable without delay; with liberty to execute the same in term time, with the usual directions.' Those directions are 'that the defendant's clerk in court may, in four days after notice thereof, join in commission, and strike commissioners names with the complainant's clerk in court; or in default thereof, that the complainant may be at liberty to take out a commission, directed to his own commissioners (*p*).

(*p*) Hinde, 294.

The commission for examining witnesses is, in many respects, similar to that for taking the answer of a defendant, already described. The manner of joining in commission and striking commissioners names, is as follows:—The clerk in court of each of the respective parties, who join in commission, writes the names of four persons, as instructed, by his client, in a book kept for that purpose; and then, each side being prepared, and notice given, the commission-book is produced, and two names out of each four are alternately struck out by the opposite parties, the remainder being the persons to whom the commission is directed. The commissioners ought necessarily to be indifferent persons; and if it be discovered that any other has been appointed, the court, on motion, or the Master of the Rolls, upon petition, will order the party to name commissioners '*de novo*;' otherwise the commission to issue '*ex parte*' (*q*).

The complainant, unless by his own default, has always the carriage of the commission; and consequently, his clerk in court makes it out, and, when sealed, sends it to his client to be executed. Sometimes a duplicate of the commission is made out for the defendant, if he sus-

(*q*) Hinde, 304, 305.

pects that the complainant has any object in delay. Also if the defendant's witnesses reside in a different part of the country, he may have a commission of his own; but in such case the opposite party may join in commission, and examine, or cross-examine, what witnesses he thinks proper. He who has the carriage of the commission, must give fourteen days notice (*r*), under his commissioner's hands, of the time and place where the commission will be executed, to all the parties who join in such commission. If it be not a joint commission, no notice is requisite.

The commissioners having met, according to notice, proceed to open the commission. The commission, being the authority under which they act, must be first produced and read, commanding them, *any two* or more of them, to examine, on interrogatories, all witnesses to be exhibited before them on both sides. To this commission a label is annexed, containing the names of the persons to whom it is directed, with the time of its return; and also the form of oath to be administered to the commissioners and their clerks, who must not be the clerks or

(*r*) This fourteen days' notice was the ancient notice of a trial in a cause at law, and from thence taken. *Vide* Gilb. For. Rom. 126.

agents of either party. The oaths prescribed (by which the commissioners and their clerks are sworn to keep the depositions secret,) being administered, the interrogatories for each party respectively examining witnesses, are produced, and at the foot of each schedule of them the commissioners present subscribe their names. Formerly the interrogatories were annexed to the commission, and so they are now supposed to be; for which reason no new interrogatories can be put, either to the same or fresh witnesses, under a commission, without the special leave of the court. It is otherwise, however, as we have seen, when the depositions are taken by the examiner; because examinations by him, are as if by the court itself, whose immediate officer he is. The form of examination and cross-examination by the commissioners, is the same as that before the examiner. The acting commissioners sign their names to each skin of parchment upon which the depositions are engrossed; and each witness signs his own depositions. All exhibits are likewise indorsed by the commissioners present, without which they could not be used at the hearing. The commissioners may adjourn, both in time and place; but if at any time they depart without adjournment, it is construed to be a refusal to act longer, and the commission is lost; unless the parties will consent to take new notice. If a

new commission be required, through the neglect or default of the complainant, or his commissioners, the defendant will have the carriage of it.

The examination being concluded, the depositions, as engrossed, together with the interrogatories, are annexed to the commission, and the whole carefully folded and sealed up, with an indorsement by the commissioners, specifying the execution. In such state the commission is to be delivered to the clerk in court who had the custody of it, either by a special messenger, to whom the commissioners personally entrust it, and who must make oath before a master that it has not been opened or altered since he received it, or by one of the commissioners in person. It then remains in the six-clerk's office, unopened, until publication is passed; in like manner as depositions taken by the examiner are to be safely and privately kept by him till publication; and if they be not in both cases thus kept, and entered as of record by the proper officer, they are void, and not to be made use of, either in this court, or at law (*s*). The paper drafts of the depositions (which, for that purpose, are also signed by the witnesses re-

(*s*) Beames' Ord. Cha. 221.

spectively) are in like manner kept by the commissioners, lest by any mischance, the commission-roll should be lost.

The commission is usually made returnable '*without delay*;' which return, if the commission be made out in term time, holds to the first return of the ensuing term; if made out in the vacation, to the last return of the subsequent term. It may, however, be made returnable on any general return day (*t*).

SECTION III.

Of Commissions to examine Witnesses abroad.

The residence of witnesses beyond sea, or out of the jurisdiction of the court, whose testimony will be material to some of the parties in the suit, frequently occasions an application for a commission to examine witnesses *abroad*; and if foreigners, in their own language, and sworn according to the custom of their country, in the most solemn manner (*u*). The application for

(*t*) Hinde, 302. (*u*) 1 Atk. 21.

this species of commission must be supported by an affidavit, naming the place of residence of those witnesses; and stating that the party cannot safely proceed to a hearing without their testimony (*v*). The proceedings under such commission are, in all respects, similar to those of an ordinary commission; with this exception, that it is usual to name more than four commissioners, to prevent disappointment; and that '*ex necessitate rei*,' in case of a joint commission, notice of executing it to two of the opposite party's commissioners, or to an agent appointed for that purpose, must be substituted for notice on the party at home. The return, which is in this case also generally 'without delay,' should be regulated by the distance, and a reasonable time allowed. If the depositions, in such case, are taken in a foreign language, they are to be translated by a sworn interpreter (*w*).

It is common to file a bill for the express purpose of having a commission to examine witnesses abroad, who are necessary to the defence or support of a trial at law, which is a species of bill of discovery; and in case of being filed by the defendant at law, ought likewise to contain a prayer for an injunction to stay proceedings at

(*v*) 2 Bro. C. C. 273. (*w*) 2 Cox, 288.

law. The order for a commission to examine witnesses abroad, may be obtained before answer (*x*).

SECTION IV.

Of the Examination of Witnesses de bene esse.

We have seen that the regular stage for the examination of witnesses is, after the *subpœna* to rejoin; but in urgent cases, as where either party has a material witness who is dangerously ill (*a*), or so old as to be in danger of dying before his regular examination can take place (*b*); or if the witness is going abroad; or is the *only* person who can prove the case (*c*): and in general, wherever a defect of justice might probably ensue from delay, the court will grant an order, grounded on an affidavit stating such facts, to examine the witness *before* issue joined; but conditionally, that is, that the depositions so taken, may be used only in case the witness cannot afterwards be examined at the regular time. This is called an examination '*de bene*

(*x*) Cooper, 222.
(*a*) 8 Ves. 31.
(*b*) Ambl. 65. 13 Ves. 261.
(*c*) 3 P. Wms. 77.

esse.' The complainant may have this order at any time after the service of *subpœna* to appear and answer; the defendant, not until he has answered (*d*). Notice of the motion must be given in all cases, except where the witness is dangerously ill, or of the age of seventy (*e*). But notice of the examination, or executing the commission, is indispensable; that the opposite party may avail themselves of the opportunity of cross-examining (*f*). In this instance also a bill is frequently filed for the purpose, when the testimony is required in a suit at law.

The order to examine witnesses '*de bene esse,*' gives liberty to examine such and such witnesses *nominatim,* and contains a clause saving just exceptions. This order is to be construed strictly, and authorizes the examination only of the persons named therein. All the formalities requisite in the examination of witnesses in chief, must be complied with in the examination '*de bene esse,*' whether at the examiner's office, or by commission in the country. Depositions taken '*de bene esse,*' cannot be published without an order made on producing and proving the register of the witness's death, or an affida-

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(*d*) 1 Dick. 92. 2 Fowl. 130.

(*e*) 8 Ves. 31.

(*f*) 4 Bro. C. C. 540.

vit that he is beyond sea, and has not been heard of for a considerable time; for such depositions are only to be used, *provided* the witness cannot be examined in chief.

SECTION V.

Of Examinations in Perpetuam Rei Memoriam.

Precisely of the same nature is the bill 'to perpetuate the testimony of witnesses,' under the like circumstances, to a disputable fact, although no suit is depending, either at law or equity: for it may be, a man's antagonist only waits for the death of some of them to begin his suit. With this difference, that here the parties go regularly through the proceedings, up to publication. The depositions, even in this case, however, are not ordinarily to be published, while the witnesses live, unless by consent of parties, or upon oath that the complainant has some trial at law, wherein he shall need them; and then, if the witnesses are unable to travel, or abroad, or otherwise incapable of giving their testimony '*viva voce*,' the *exemplifications* (g) may be given

(g) An Exemplification is the copy or *example* of a matter recorded or inrolled—as decrees, letters patent, depositions, &c. and is made out or copied from the inrolment thereof, and sealed with the great seal. Curs. Can. 375.

in evidence in any other court, by order of this court.

This species of examination, which is termed '*in perpetuam rei memoriam*,' is most frequent, when lands are devised, by will, away from an heir at law. The devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in Chancery against the heir; and sets forth the will '*verbatim*,' suggesting, that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue, as in other cases, and examine witnesses to the will, and pass publication. After which the cause is at an end, without proceeding to any decree; no relief being prayed by the bill. This is what is usually meant by proving a will in Chancery.

SECTION VI.

Of Objections to the Credit or Competency of the Witnesses.

Witnesses in this court may, as at law, be objected to on the ground of *competency* or *credit*. The manner of impugning the *credit* of a witness is by '*exhibiting articles*', as they

are called, specifying the objections, which articles are annexed to the depositions, and filed with them in the respective offices. The proper time for taking advantage of an objection, as to *competency*, is when the witness is produced to be examined; when a cross interrogatory may be framed and put to him on that point; and if the witness untruly denies the fact which creates his incompetency, other witnesses may be examined to that point, in order to discredit him (*a*). If, however, the party is not acquainted with the ground of objection in sufficient time, the court will allow an examination to *competency*, even *after* publication; but the way to apply for this is not by exhibiting articles, but by motion for leave to examine to this matter, upon a foundation of ignorance at the time of the examination (*b*). And if a party has omitted to cross-examine a witness as to his interest in the suit, he may, *before* publication, move, on affidavit, for leave to re-examine the witness as to the fact of interest (*c*).

With regard to credit, articles may be exhibited either before or after publication (*d*), and on certificate of their being filed, an order will

(*a*) 3 Atk. 643. 8 Ves. 320.

(*b*) 3 Atk. 643.

(*c*) 2 Madd. Rep. 322.

(*d*) 19 Ves. 127.

be granted that the party be at liberty to examine witnesses on general interrogatories, as to the credit of the person whose testimony is sought to be impeached, and as to such particular facts only as are not material to what is in issue in the cause (*e*). If a commission be required for this purpose, it will be directed to the former commissioners (*f*). The other party is to support the credit and reputation of his witnesses, and may examine accordingly '*toties quoties*'; their depositions must be published as in other cases; and the point is decided, with all other questions of evidence, at the hearing. A person is not allowed to discredit his own witness (*g*). After a cause has been set down, it is too late to examine to credit (*h*).

(*e*) 8 Ves. 324. 9 Ves. 145.

(*f*) 9 Ves. 146. 1 Ves. & Beames, 153.

(*g*) 8 Ves. 327.

(*h*) 3 Atk. 522.

CHAPTER XI.

OF PUBLICATION, AND ITS INCIDENTS.

SECTION I.

Of Rules to pass Publication, and of enlarging Publication.

THE next object of our enquiry is Publication, and its incidents. We have already seen, that after the return of the *subpœna* to rejoin, the complainant gives the opposite parties a rule to produce witnesses, unless he requires a commission; in which case it is made part of the order for the *subpœna*, that the defendant should join and strike commissioners' names in four days after notice (*a*). If the defendant does not join in commission, or does not examine any witnesses under it, still the complainant must, on the return of the commission *ex parte*, give

(*a*) *Vide ante*, p. 118.

him a rule to produce his witnesses; at the expiration of which (which is always in a week), he gives another rule for a day to shew cause why publication should not pass. Upon the return of a joint commission, where both parties have examined witnesses in chief, this latter rule is alone requisite; and either party, who has examined, may give rules to the other (*b*). But as the complainant is the person principally interested in the proof, in order to establish his claim, it is his right first to give rules for publication, as well as to have the carriage of the commission; and the defendant cannot give a rule to pass publication, unless the complainant has been in default one term after the cause is at issue (*c*). If, on the day appointed, no good cause be shewn to the contrary, publication passes; and the sworn clerk or examiner, in whose custody the depositions remain, is at liberty to give office copies of them to any of the

(*b*) A *rule* signifies a particular *order of course*, founded upon some general order, or the common course of the court, touching the ordinary proceedings in a cause; and which is entered and issued without either petition or motion. All rules are to be entered in the common book, called the House Book; and on entering thereof, notice shall be from time to time given to the under-clerk on the other side, that is towards the cause, that so the client may not be surprised. And note, rules are to be entered in term only. Curs. Can. 326.

(*c*) 1 Dick. 84.

parties applying. A copy of the rule to pass publication, should be served on the examiner, or his deputy, to authorize him to publish such depositions as were taken by him. The clerk in court has a notice in writing given him by the adverse clerk, who enters the rule.

Publication may also pass *by consent* of both parties, signified by such consent being entered in the rule book, and signed by the respective clerks.

All rules, it is to be observed, must commence and expire within the term. But, as no witnesses can ordinarily be examined after publication once passed, on account of the manifest danger of subornation of perjury; (and even if the examiner be only served with an order whereby publication is to pass on a certain day, he cannot afterwards examine any witnesses (*d*),) it becomes a frequent subject of application to the court, to enlarge the time of publication beyond the limitation of the rule or order. This is necessary where either party has material witnesses to produce, who could not be examined in time. As soon as the complainant has given a rule to pass publication, he may set down the cause for hearing; but by the rule of the court,

(*d*) Gilb. For. Rom. 145.

no hearing can take place the same term in which publication passes, unless by a special order (*e*). When, therefore, an application is made on the part of the defendant to enlarge publication, the order will be granted conditionally, not to hinder the complainant from setting down his cause in the mean time; and such order is of course. But if the cause has been set down, and the *subpœna* to hear judgment has *not* been served, that fact must be stated by affidavit; and in such case notice of the motion must be given.

The court will, even under special circumstances, enlarge publication, after the *subpœna* to hear judgment has been served, but always so as not to interfere with the hearing; except where the party who sets down the cause himself makes the application; in which case he must move to adjourn the cause, and serve the order thereon on the adverse clerk in court, before the day on which the cause is set down for hearing: but the circumstances must be very special, to warrant an application to enlarge publication beyond the hearing (*f*).

All orders to enlarge publication should be

(*e*) Beames' Ord. Chan. 319. (*f*) Hinde, 385.

obtained and served, as well upon the adverse clerk in court, as upon the examiner, on or before the day on which publication actually passes in the cause. As this court is extremely solicitous that ample justice should be done, and that no mere forms, however advantageous, should obstruct its course, it will grant an order further to enlarge publication, even after the rule for passing publication has expired; but in such case it requires an affidavit from the party, the solicitor, and clerk in court, that they have not seen, read, nor been informed of the contents of the depositions taken in the cause, and that they *will* not, till publication is duly passed by further order; because, by such affidavit, the spirit of the rule is preserved (*g*). This order, supported by the above affidavit, is also of course, before the cause is set down; subject, however, to the same conditions as already mentioned: and when granted, the opposite party is at liberty not only to cross-examine, but to examine witnesses at large, without any motion for that purpose (*h*). In most cases, too, the court will enlarge publication, and give a party an opportunity of examining witnesses, even though publication should have been already enlarged by a precedent order, if any reasonable ground can

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(*g*) Gilb. For. Rom. 146: (*h*) 2 Vern. 253.
13 Ves. 512.

be shewn upon affidavit of the facts, and that the witnesses are material (*i*). This is a special motion, and requires notice.

SECTION II.

Of the Proceedings upon Cross Bills.

With respect to cross bills, which, as we have already seen, are filed by a defendant in a cause, where he has either some relief to pray, or discovery to seek against the complainant, or any of the co-defendants; this is the proper stage to stay the proceedings, so that both causes may come on to be heard together; or at all events, that the defendant in the original suit may have the benefit of full proof in his cross cause; the rule of the court being, not to stay proceedings generally till the answer comes in to the cross bill, but only to stay publication (*j*).

As soon as the original bill is filed, the defendant may forthwith file his cross bill; and it will be highly advantageous to do so before he answers, for a reason we shall see further on. The defendant to a cross bill being already in court by the

(*i*) Hinde, 383. (*j*) 1 Atk. 21—291.

original bill, service of process on his clerk in court, is good service (*k*). The complainant, however, in the original cause, has the priority, and cannot be compelled to answer the cross bill, until the defendant has put in his answer to the original bill. If, indeed, he amends the original bill in material points, subsequent to the filing of the cross bill, the amended bill will be considered as a new bill, and he thereby loses his priority (*l*). But in the ordinary case, he may proceed with the original cause in the regular course up to publication, notwithstanding that he may not have put in his answer to the cross bill. In this event, if publication were to pass, it would cause a serious inconvenience to the defendant, because he could not afterwards examine witnesses to the same points which had been in issue in the original cause, in pursuance of the rule so often stated; and yet, until the answer to the cross bill came in, he could not know in what manner to frame his interrogatories, or what defect of proof it might be necessary for him to supply. Under such circumstances, therefore, the court, on application, will enlarge publication until a reasonable time (usually a fortnight) after the complainant shall

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(*k*) 4 Bro. C. C. 478. 218. 3 Atk. 724. 2 Cox.
(*l*) 2 P. Wms. 435. 2 Atk. 371.

have put in his answer to the cross bill (*m*); and where the cross bill has been filed in due time, before the cause has been proceeded with (that is, *before* the original answer) the motion to enlarge publication is of course; but it is by no means so if the cross bill has been filed *after* answer, for then there must be a *special* application to account to the court for the cross bill not being sooner filed; otherwise, a cross bill might be resorted to merely for the purposes of vexation and delay (*n*).

A defendant may file a cross bill *after* publication; but in such case, or where he does not stay publication in the original cause, he must proceed to hearing on the depositions already published: but any of the depositions in the cross cause, not relating to the matters in issue in the original cause, may be read (*o*). An answer to a cross bill cannot be used as part of the answer to the original bill; but the defendant having obtained the discovery, should move for leave to file a supplemental answer.

(*m*) 1 Atk. 21—291.

(*n*) 2 Ves. 336. 16 Ves. 93.

(*o*) 3 Atk. 500.

SECTION III.

Of the Publication of Depositions taken de bene esse, *and of suppressing Depositions.*

The fundamental rule with regard to depositions taken '*de bene esse*' is, that they are not to be published but where there is a moral impossibility to have an examination in chief (*p*). This fact must therefore be made out to the satisfaction of the court, on affidavit; and consequently, it requires a special application grounded on such affidavit, and an allegation that publication has passed in the cause, to have the depositions in this case published. If, when they are published, any irregularity is discovered, the proper course is immediately to move to discharge the order for publication, upon notice to the opposite party; and the court will decide, upon hearing the facts alleged on both sides, verified by affidavit: and should the order be discharged, the depositions taken '*de bene esse*' will be of no avail (*q*). But it will be too late to make objections for irregularity at the hearing of the cause, because such objections are preli-

(*p*) 2 Ves. 337. (*q*) 2 Atk. 189.

minary, and ought to be decided beforehand (*r*). The credit or competency of the witness may, however, be excepted to, as in an examination in chief, and such exceptions urged at the hearing; for the order to examine a witness '*de bene esse*' always contains a clause, that it be without prejudice to any exception which may be made at the hearing of the cause.

When any irregularity has occurred in taking the *ordinary* examination, the course is, not to discharge the order for publication, but to have the depositions *suppressed;* and the reason of the difference between the mode of proceeding in this case, and that of depositions taken '*de bene esse*' is, that in the former instance, although the depositions be suppressed, the court may see reason to relieve the party, by allowing him to have his witness examined a second time before the master (*s*); but where the examination '*de bene esse*' has been irregular, the witness being dead, no remedy can be applied, and the depositions are wholly lost.

After publication therefore has passed, the first care of either party must be to look to the interrogatories and depositions, to see that they

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(*r*) Hinde, 390.

(*s*) 1 Eq. Ca. Abr. 232. Ambl. 585.

have not been improper; as that the interrogatories are not leading; or that neither they nor the depositions are scandalous *and* impertinent (*t*). If the party, on perusing them, is advised that such objection lies, or that there is any other apparent incorrectness in the proceedings at the examination, it is a motion of course (*u*), to refer them to the master for enquiry; who gives his opinion thereon in the form of a certificate; but which nevertheless may be excepted to, like other reports: but the court will not refer interrogatories and depositions for impertinence alone, without scandal (*v*). If the irregularity complained of be obvious on the face of the examination, or if it be certified by the proper officer, *and* clearly substantiated by the affidavit of the party injured, the depositions will be suppressed in the first instance, on motion, without a reference to the master. On such depositions, the clerk in court indorses the word '*suppressed*' (*w*), to prevent their being read at the hearing; and no copies of any depositions whatever can be received in evidence, unless authenticated by the signature of the officer in whose custody they have been.

(*t*) 2 Ves. Jun. 189.
(*u*) 12 Ves. 201.
(*v*) 19 Ves. 113.
(*w*) 15 Ves. 380.

CHAPTER XII.

OF THE HEARING.

SECTION I.

Of setting down a Cause, and the Subpœna to hear Judgment.

THE pleadings being now concluded, and the trial of matters of fact at an end, by the publication of the depositions, the next business is to obtain the judgment of the court on the points at issue, and its authority, by the final sentence or decree. For this purpose the cause must be *set down for hearing*, and process of *subpœna* served upon the opposite party, to attend and hear judgment; for the court will not make its decree in the absence of any of the parties who are to be affected by it, unless after being duly cited they neglect to appear, which is a sort of voluntary abandonment of the cause.

In order that the parties may have ample time to prepare for the discussion at the hearing, it is

a standing rule which can only be departed from under very special circumstances, that the cause is not to be set down for the same term on which publication passes (*a*). If, however, the complainant does not then set it down, it may afterwards be done '*ad requisitionem defendentis*'; for the court will not allow a cause at this advanced stage to be dismissed for want of prosecution merely, and therefore gives the defendant the privilege of bringing it to a hearing on the complainant's default (*b*): and in injunction causes, the defendant is at liberty to apply for setting down the cause, the term next after publication hath passed. The manner of setting down a cause is by entering the title of the cause, and the object of the suit, in the cause-book, which is kept by the register. The six-clerks claim a right to set down a certain number of causes in each term, to be heard before the Lord Chancellor (which now includes the Vice Chancellor) or Master of the Rolls, as the party applying thinks proper. When the number to which they have a right is completed, the remaining causes must be set down with the register, upon producing a certificate of the pleadings being filed; and, if there has been a rule to produce witnesses, also that publication has been

(*a*) For. Rom. 152. Beames' Ord. Chan. 337.

(*b*) Beames' Ord. Chan. 337.

duly passed. These causes have priority according as they stand in the book; and the register makes out a list of the twelve causes next in rotation, called the *paper of causes*, on the day preceding the hearing. But as there is a day in term appointed for hearing *short causes*, *viz.* such as are either of course, or involving little difficulty, it is usual to advance such causes, upon counsel's certificate, so that they may be heard on that day. Causes are also advanced or adjourned, so as that two suits, if they be on the same matter, or between the same parties, as in the case of cross-causes, may be heard together, and the depositions in one cause used in the other, on order obtained for that purpose. There is also a paper of *consent causes*, which are heard before the Master of the Rolls on stated days. These are causes where the decree is matter of course, and consented to by the parties; the defendants submitting to attend without the service of a *subpœna*, to hear judgment.

In all other cases, however, it is essential that the party who sets down the cause, should serve the opposite side with this *subpœna*; for if the cause comes on to a hearing, and he is not provided with an affidavit of service of such *subpœna*, unless the adverse party attends voluntarily, the cause will be struck out of the paper;

and if afterwards restored on petition, will nevertheless be placed at the end of the list on the register's book. On the other hand, when the *subpœna* to hear judgment has been duly served, and either party in that case neglects to attend upon the day appointed for hearing the cause; if it be the complainant who is in default, his bill will be dismissed with costs; if the defendant is not in attendance, the complainant, on reading a word or two of the office copy of the answer, properly signed, takes such decree as he thinks he can abide by, according to the prayer of his bill; but such decree is only '*nisi*,' and the complainant must then sue out a *subpœna*, returnable in term (as all judicial writs are), and served at the defendant's place of residence, on one of the family, to shew cause against the decree; and in default thereof such decree is made absolute.

The *subpœna* to hear judgment is procured on the register's certificate that the cause has been set down; and must be made returnable three days at least before the day appointed for hearing; but if there be not three days in term before the hearing, then the return must be on a general return day; and the label always expresses the day actually appointed. This writ should be served personally: but if the party avoids process, service may be substituted, by

order obtained for that purpose, on his clerk in court, or solicitor, leaving a copy of the order at the last place of residence of the party absconding (c). In the case of an *infant* defendant, the service of the *subpœna* should be on the guardian '*ad litem*' (d). When the party resides in the country, *i. e.* twenty miles from town, the writ must be served fourteen days before the hearing, except in the short vacation between Easter and Trinity terms, when ten days' notice suffices: as likewise in a town cause, ten days is the time required.

SECTION II.

Of the Manner of hearing a Cause.

When the day fixed on for the hearing arrives, each cause is called on in the order in which it stands in the paper of causes for the day, and counsel must be in attendance and prepared for the argument. As it sometimes happens that counsel are not ready when the cause is called on, the court will grant the indulgence of adjourning the hearing to a stated day, un-

(c) 2 Ves. 23.

(d) 2 Dick. 139. 2 P. Wms. 643.

less any material inconvenience were to arise from it; but in such case, the party who applies for such a favour, if the other side does not consent, must pay the ordinary costs of the day; and, in general, the party whose deficiency causes an adjournment of the proceedings, must pay the other side the costs of their attendance.

The manner of hearing a cause is shortly this: The junior counsel on both sides severally open the pleadings, wherein they briefly state the substance and prayer of the bill, and the nature of the defence; after which the complainant's leading counsel states the case, and the points in issue, and submits his arguments upon them to the court. The proofs in favour of the complainant's case are next read, which are the depositions of his witnesses, and the admissions in the defendant's answer; and such *exhibits* as are necessary are produced. If the hearing be on bill and answer only, as the complainant, by not replying, admits the answer to be true in all points, it must be wholly read, and no other evidence can be admitted but matter of record. If the court, in such case, does not find sufficient matter confessed in the answer, whereon to ground a decree, the complainant will be admitted to reply, on paying the costs of the day, within four days after the hearing, otherwise the

bill to be dismissed with costs (*e*). When the proofs are gone through, the remaining counsel for the complainant address the court on his behalf. The counsel for the defendant then pursue the same course on behalf of their client, and the leading counsel for the complainant replies; which concludes the argument on both sides. The counsel for such parties as have only a secondary or derivative interest in the suit, are also heard, if necessary to explain the situation, or protect the interest of those for whom they are concerned.

When the complainant replies to the answer, and serves the defendant with a *subpœna* to rejoin, as by such proceeding he denies the truth of the answer, and puts the defendant on the proof, no part of the answer can be read in support of the defendant's case; but if the complainant read only a part of a sentence in the answer, the other side has a right to read the whole of that sentence, because it may be that the entire context may bear a very different construction from that sought to be given to an extract merely. But, on the other hand, as the defendant will not be allowed the benefit of his answer upon oath at the hearing, if issue

(*e*) Hinde, 416.

has been joined; so the complainant must have the testimony of two witnesses at least, in order to contradict a positive denial in the answer (*f*).

It frequently happens, that a suit is deficient for want of proper parties. The time for making such objection is after the pleadings have been opened, and before the merits have been gone into (*g*). If the objection be valid, the court will order the cause to stand over, giving the proper directions for adding the parties requisite (*h*); and if the objection had been raised by answer, as well as at the hearing, so that the defendant was guilty of no neglect in that respect, the complainant will be ordered to pay the costs of the day (*i*). The court will, however, direct the addition of necessary parties at any stage of the proceedings, so as to effectuate the decree; as the decree only binds such as are parties, or persons deriving from them. When the party omitted is essential, it is discretionary with the court either to dismiss the bill without prejudice, or to let it stand over, with liberty to amend; because in this latter

(*f*) 2 Chan. Ca. 8. 1 Vern. 161.

(*g*) 3 Atk. 110.

(*h*) 1 Atk. 289. 2 Dick. 498.

(*i*) 2 Atk. 14. 3 Madd. Rep. 61.

case the bill must be radically defective (*j*). But the general rule is, that a bill is never dismissed for want of parties merely. An objection, for want of formal parties who might have been named in the first instance, cannot be raised a second time, after the cause has been already postponed on the same ground (*k*).

(*j*) *Vide* Gilb. For. Rom. 159.

(*k*) 3 Atk. 217.

CHAPTER XIII.

OF THE DECREE.

THE court having heard the arguments on both sides, and the evidence by which they are sustained, proceeds then to give its sentence, or *Decree.* The decree is defined to be the order of the court, pronounced on hearing and understanding all the points in issue, and determining all the rights of the parties to the suit, according to equity and good conscience (*a*).

SECTION I.

Of the Decree Nisi.

That the defendant may not be concluded, even by his own neglect, without a hearing, we have already seen that the decree is only *nisi* against a defendant who fails to attend, although

(*a*) Hinde, 129.

regularly served with process to hear judgment. If he therefore means to dispute the decree obtained *nisi*, he may apply by petition to the judge before whom the cause was set down to be heard, to have it restored to the paper of causes; which is an order of course, upon payment of the costs incurred by the other party in consequence of his non-attendance. The register will therefore not pass the order, unless there is a certificate shewn him of such costs being paid, or of a tender and refusal. But if, on the other hand, the defendant chooses to submit to the decree, or is again in default, the complainant having served the *subpœna* to shew cause, and on its return producing the affidavit of service, and the register's certificate that no cause is shewn, or no order obtained, the decree is made absolute; and the defendant has then no remedy but by petition for a re-hearing, and cannot on motion discharge the order making the decree absolute (*b*).

In like manner, an absolute decree is never pronounced against an infant in the first instance; but he is allowed to shew cause against it at any time within six months after he comes of age; because an infant is always under the protection of the court, and there may be collu-

(*b*) 3 Meriv. 698.

sion or neglect on the part of his guardian, through whom he answers. Such collusion or fraud, therefore, is the chief ground for reversing a decree after he is of age; or he may shew error, or make out a new case, not before insisted upon. When therefore he comes of age, he is to be served with a *subpœna* to shew cause; and before an order is obtained for making the decree absolute, he may put in another answer (the answer of his guardian not being binding upon him), make a new defence, and examine fresh witnesses (*c*). He is not, however, under the necessity of waiting until he is of age, to seek redress, but may impeach the decree at any time before it is made absolute, by an original bill (*d*).

The decree '*nisi*' against an infant, is made absolute in the ordinary way, on affidavit of service and certificate; but it differs materially from the decree for default of appearance at the hearing, in this; that the former, when drawn up, passed, and entered, is in many respects considered as an absolute decree, so as to authorise proceedings under it; for the court having given judgment on the *merits*, if, when the infant arrives at age, he cannot shew good cause to

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(*c*) 1 P Wms. 503 2 P. Wms 401 2 Atk 531

(*d*) 1 P Wms 736.

the contrary, it is an absolute decree '*ab initio*'; and unless there is new matter, fraud, or collusion, an infant is bound by a decree made for his benefit, as likewise his executor, if he dies (*e*). But the decree '*nisi*' by default is a mere nullity, until made absolute.

SECTION II.

Of References to the Common Law Courts, under a Decree.

It seldom happens, that upon the hearing of a cause, the court can make a *final* decree in the first instance; for, either some point of fact may be strongly controverted by conflicting testimony, in which case this court, sensible of its deficiency in the mode of trial, will send the point to a jury on a '*feigned issue*': or, secondly, the complainant's legal right may be disputed; when the court will direct an action to be brought to try the right, but retain the cause on the equity reserved: or, thirdly, a point of law may arise, on which the court may require the opinion and advice of the common law judges, and which is referred to them on a *case stated* for that purpose: or, lastly, there may be accounts to be settled, or interests to be ascer-

(*e*) 2 Atk. 530. 2 P. Wms. 519. 3 Atk. 626.

tained, or acts to be done; such as the sale of property for the payment of incumbrances; which are the proper subjects for a reference to a master. In all such instances, the decree is only *interlocutory*; or, more properly, the court makes a *decretal order*, and the cause is again brought on for *further directions*, or on the equity reserved.

The mode of producing a feigned issue is this: the supposed plaintiff declares that he laid a wager of five pounds with the defendant, in the affirmative of the controverted fact; for example, that A. was heir at law to B.; and then avers that he is so, and brings his action for the five pounds. The defendant admits the wager, but avers that A. is not heir at law to B., and thereupon that issue is joined, which is directed out of Chancery to be tried; and the verdict determines the point in question: but it is still discretionary with the court, to direct a new trial, if it has reason to be dissatisfied with the former verdict (*f*). The verdict is certified to this court, by the judge before whom the issue is tried; and if the plaintiff neglects to bring it to a trial, the adverse party may obtain an order that it should be taken '*pro confesso*' (*g*).

(*f*) 8 Ves. 536.

(*g*) Newl. 352, and the case there cited.

When a case stated is sent to a court of law, the course is to move for a '*consilium*' in the court to which it is referred; and the rule being entered, and copies of the case given to each of the judges, the question is argued before them by counsel on both sides; after which they deliver their opinion in the form of a certificate to this court, which generally acts upon their advice. But even here the court is not concluded; but may send the same case to another court of law, or use its own discretion in pronouncing its decree, notwithstanding such certificate of the judges. It is usual to refer to a master, both to settle the form of the issue, and to fix the terms of the case (*h*); but the court directs in what court of law the feigned action shall be brought, and who shall be parties; or to what court the question of law shall be referred.

SECTION III.

Of References to the Master, under a Decree, and of Examinations in the Master's Office.

With respect to references to the master, we have already stated all the incidents and forms

(*h*) 2 Dick. 474.

of proceeding generally, in another part of this work (*i*). All that will be necessary, therefore, in this place, is to state some of the peculiarities which attach to references under a decree.

After the decretal order has been passed and entered, the first step is to leave a copy of the title and ordering part of it, with the master to whom the cause is referred. If a party is directed by the decree to perform some specific act before the master, he must be served with warrants in the usual manner, as in the case of a summons to appear; and in case of his default, on the service of the third warrant, or if further time has been granted him either by the master or the court, at the expiration of such time application may be made to the court on the master's certificate, to order him to do the act required within a certain time, or stand committed.

In order the better to enable the master to investigate the matters referred to him, the decree frequently gives him the power of examining the parties or witnesses upon interrogatories; and upon his certifying that a commission is necessary, it is granted by the court, and the master is then technically said to be *armed* with a com-

(*i*) *Vide ante,* cap. 5. sec. 2.

mission. If the order for a commission be improperly obtained, the course is to move to discharge the order (*j*). The depositions taken by a master, are kept in his office; those taken by commissioners are filed with the six-clerks (*k*): but no publication passes in either case; as their sole use is to assist the master in making up his report; and in this respect they are merely '*ad informandam conscientiam judicis.*'

Where a *party* is to be examined, the interrogatories must be *settled by the master* (*l*); and when engrossed, the master signs a certificate of having allowed them, which is filed in the report office, and which consequently may be excepted to (*m*). The party to be examined, on being served with the usual warrants, applies at the master's office for a copy of the interrogatories, to which he prepares written answers, called his *examination*, which is then left at the master's office; but if taken under a commission, it must be returned to the six-clerk's office. This examination is for the benefit of all parties interested, who are therefore entitled to take copies (*n*). If the examination is conceived to be insufficient, an order must be obtained to re-

(*j*) 1 Dick. 377.
(*k*) 3 Ves 607.
(*l*) 17 Ves. 434.
(*m*) 6 Ves. 458.
(*n*) 3 Ves. & Beames, 176.

fer the interrogatories and examination to the master; and if he reports accordingly, the examinant must, unless he excepts to the report, put in a further examination, or be committed. If three examinations are reported insufficient, the party will be committed at once. The same rule holds with regard to costs, as in the case of insufficient answers; but upon an examination being reported insufficient, new interrogatories cannot be added *as of course*, a special application being required for that purpose (*o*): and the reason of this departure from the analogy of insufficient answers is, because the interrogatories for an examination are previously settled and allowed by the master. Neither can the master, without a special order, re-examine a party who had been previously examined (*p*). An examination may also be referred, for impertinence; and the report must state in what particulars the same is impertinent (*q*).

When it is necessary to examine witnesses in the master's office, they are to be examined either before the master (*r*) in person, or before commissioners in the country, upon interrogatories, settled and signed by *counsel*; because the party who requires their testimony, knows

(*o*) 3 Atk. 511.
(*p*) 17 Ves. 434
(*q*) 3 Madd Rep 246.
(*r*) 3 Ves 603.

best how to prove his own case. But to examine a witness, who had already been examined in chief, though upon different interrogatories, requires a special order; and in such case the master must himself settle the interrogatories (*s*). So, likewise, it is necessary to make a special application for liberty to examine witnesses to the *same* points which had been examined to in the cause (*t*). In like manner, the interrogatories for the examination of creditors, who come in with their claims under a decree for the administration of assets, are settled by the master, to prevent fraud or collusion.

When a particular inquiry is directed by a decree—as with respect to a proper guardian, and maintenance for an infant; or of what real estate the testator died seised; and such like; *a state of facts* should be prepared and laid before him in writing; and if it contain scandal or impertinence, it may be referred to the master, in the same manner as the pleadings in the cause (*u*); for, without such reference, although they are laid before him, he could not certify that they are scandalous or impertinent; as, it is to be remembered, the report is always strictly confined to the order of reference.

(*s*) 13 Ves. 360. 2 Dick, 508, 509.

(*t*) Cooper, 291.

(*u*) 18 Ves. 114.

The *state of facts*, which is laid before the master under a decree for an account (which is always accompanied with a reference of the accounts), deserves a more distinct consideration, both from its frequency and peculiarity. In this instance, the complainant prepares a statement of the several items which he claims to be entitled, upon *proof*, to charge the defendant with in account. It must be made up, therefore, from the evidence in the cause, the defendant's answer, and schedules; and lastly, if necessary, his examination.

This statement is called the *charge;* and when prepared, is left in the master's office, to be investigated by him; and when allowed, the defendant must then bring in his *discharge*, which contains a statement of payments and disbursements by him, or whatever else may discharge him from the debt made out against him on the other side of the account. For all sums above forty shillings he must produce vouchers, unless it be otherwise directed by the decree; in which case, as well as in the payment of sums under forty shillings, he will be allowed them on his own oath (*v*); but it will not be sufficient to swear to his belief only: he must swear to the fact (*w*).

(*v*) 2 Vern. 176. (*w*) 2 Atk. 409.

On the same principle, as a defendant is not permitted to read his answer in proof at the hearing, so neither can a defendant support his discharge by his answer or examination, unless where the answer or examination states that he received a sum of money, and in the same sentence states that it was paid over *on the same day;* because that is but one transaction, and the same on which the complainant grounded the item in his charge.

After all the matters have been arranged, and the inquiries made, which were referred to the master, he proceeds to make his *general* report thereon to the court. The mode of excepting to reports we have already noticed.

SECTION IV.

Of further Directions, and the final Decree; and herein of rectifying the Minutes, and signing and enrolling Decrees.

The report, when allowed, or submitted to, is the ground-work of the *final decree* made, when the cause is again heard on further directions. If exceptions have been taken to the master's report, the cause may be brought on, on those ex-

ceptions, and for further directions at the same time; in which case a copy of the report, as well as of the decree, should accompany the petition. Either party may set down the cause for further directions, by petition, which (the order being served on the adverse clerks) is entered in the cause-book, and comes on, in its order, on one of the days appointed for that purpose. But as it usually requires a considerable time finally to arrange all the matters referred to the master, preparatory to the decree; and as some of the parties might be materially inconvenienced by the delay, that difficulty is obviated by allowing the master to make a *separate* report upon such points as demand a speedy decision; and this liberty is given him either by the terms of the former decretal order, or may be obtained afterwards on motion of course, by any of the parties who desire it.

On the coming in of the separate report, the party, whose interest is concerned, must then have the cause set down for *further directions*, by petition for that purpose; and thereupon such further *decretal order* is made as the urgency of the occasion may demand;—as the allowance of maintenance for an infant; the payment of a gross sum of money to a person, who appears to be entitled *by the master's report*; and the like. In such cases it would not be suffi-

cient to make the application by way of motion or petition; for the office of a *cause petition* is only *to carry a decree or decretal order into execution;*—as to have money paid out of court, to a party who is entitled *under the decree:* but to *add* to the decree, the cause must be heard *on further directions:* to *modify*, *alter*, or *reverse* it in the minutest particular, there must be a *rehearing* before it is *enrolled;* after *enrollment* the party is compelled to resort to a *bill of review.*

When the decree is pronounced, the minutes of it are taken down by the register; and if any mistakes appear, and the register cannot, consistently with his duty, make the alteration required, an application may be made to the court, either by motion or petition, *to rectify the minutes.* And the same incidents hold as to settling the minutes, as have already been noticed under the head of 'interlocutory orders' (*a*). Even after the minutes are passed, the court will, on motion, allow a usual direction to be added, which had been omitted by mistake (*b*).

All decrees, like interlocutory orders, must be

(*a*) *Vide ante*, p. 66. (*b*) 7 Ves. 293. 12 Ves. 456.

regularly *drawn up, passed, and entered*; and the rule, with regard to the time for entering interlocutory orders, extends also to the entering and enrolment of decrees and dismissions; namely, decrees made in Michaelmas and Hilary terms, are to be entered before the first day of the Michaelmas term following; and all of Easter and Trinity terms, before the first day of Easter term following: otherwise there must be an order to enter them *nunc pro tunc*, which is of course, when applied for in reasonable time (c).

But decrees are not perfected till *signed* by the Chancellor, and *enrolled*. If they be pronounced by the Master of the Rolls, or Vice-Chancellor, they are not considered as the act of the court, until they have had the Chancellor's signature; and even when pronounced by the Chancellor himself, they are merely regarded as declarations of his opinion, which may be changed or reversed upon a rehearing, until they have received the final sanction of the court, by being *signed and enrolled*. *Enrolment* is the engrossing of the decree on parchment, and leaving it with the proper officer; which may be done by either party: and until this last act is performed, the decree is only '*in fieri*,' and may be altered at

(c) Beames' Ord Cha. 205; and *vide* Hinde, 432

discretion; and therefore the signing and enrolling of decrees with expedition, is not encouraged; because, if subsequently a mistake is discovered, it occasions the expence of a bill of review, or an appeal to the House of Lords. For this reason, a party is at liberty, without assigning any cause, to enter a '*caveat*,' which will prevent the enrolling for a month or twenty-eight days, from the time of presenting the *docket* of the decree to the Lord Chancellor to be signed, and notice given by the Chancellor's secretary to the clerk on the other side (*d*). The *docket* is a draft copy of the decree, from which the enrolment is taken, and must be carefully compared with the several pleadings and records which it recites, by the six-clerk who prepares it; and who certifies its correctness by his signature on the last sheet, previous to its being presented to the Lord Chancellor (*e*). Sometimes, when a mere clerical error has crept into the enrolment, or the decree has been enrolled by surprise on the other party (*f*), and *the merits not gone into* (*g*), the enrolment has been ordered to be opened, to let in a rehearing, and to save the expence of a bill of review; but this is very

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(*d*) 1 P. Wms. 608. 1 Ves. 326.

(*e*) Beames' Ord. Cha. 112.

(*f*) 1 Vern. 131.

(*g*) 16 Ves. 115. 1 Ves. 206. 14 Ves. 231.

rare; and the circumstances must be very strong to warrant such an application.

The enrolment is that which gives the decree its full efficacy; previous to which it has only the force and effect of an interlocutory order: wherefore the decree is not pleadable until after it is enrolled (*h*). When the decree is enrolled, it is left with the record-keeper for safe custody; and it cannot afterwards be reversed but by appeal to the House of Lords within five years, or by bill of review, brought within twenty years from the pronouncing of the decree (*i*).

(*h*) 3 Atk. 809.

(*i*) 1 Bro. Parl. Ca. 95.

CHAPTER XIV.

OF REHEARING, AND THE BILL OF REVIEW.

SECTION I.

Of the Caveat, and Petition for a Rehearing.

When a party is dissatisfied with a decree, his first step should be to enter a '*caveat*,' to prevent the enrolment. He may then apply by petition to the judge, before whom the cause was heard, for a *rehearing*; or to the Chancellor, by way of appeal. A cause heard *a second time* by the Lord Chancellor, must be opened as a case (*a*). The petition for a *rehearing* is signed by two counsel; and ought to state the grounds on which it is sought to rehear the cause; but if it states a case different from that before the court when the decree was pronounced, it will be ordered to be taken off the file (*b*): neverthe-

(*a*) 2 Atk. 49. (*b*) 1 Meriv. 35.

less, on such rehearing, additional evidence may be adduced (*c*). If it be necessary to introduce new facts, there must be a supplemental bill, in the nature of a bill of review; in which case the cause will come on to be heard upon the matter of that supplemental bill; together with a rehearing of the original cause; and the court will vary the decree upon the rehearing, taking into consideration the new, or lately discovered facts. There is only one instance of the court's refusing to grant a rehearing (*d*): but a rehearing being granted, does not stay proceedings under the decree, unless a special order be obtained for that purpose (*e*). The court, however, under some circumstances, will *suspend* the decree, or part of it, till after the rehearing. The party applying for a rehearing, must deposit ten pounds with the register, to be paid to the adverse party, in case the decree is not varied in a material point; and he is likewise liable to such further costs as the court may direct.

A cause is generally set down for a day certain, to be reheard; and notice must be given

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(*c*) Ambl. 90. 13 Ves. 456. 1 Atk. 390.

(*d*) Fox *v.* Mackreth, 2 Cox, 158.

(*e*) 14 Ves. 585. 17 Ves. 380. 18 Ves. 452. 3 Madd. Rep. 278. Beames' Ord. Cha. 266.

two days previously, to the opposite parties (*f*). The petitioner must also leave copies of the decree and petition with the judge, two days before the rehearing (*g*). When the cause comes on to be reheard, with respect to the party who petitions, it is only open as to the parts complained of; but with respect to the other party, it is open as to the whole (*h*). There may also be a rehearing with regard to exceptions, pleas, and demurrers, as well as of the cause.

SECTION II.

Of the Bill of Review.

A rehearing will not be granted, if once the decree has been enrolled; even if only one of several defendants has caused the enrolment (*i*): and the party aggrieved can *in no case* obtain relief against the decree by an *original* bill for the same cause; for then the decrees of the court would be contradictory, which would breed the utmost confusion (*j*). The only remedy, therefore, in such case, is by a bill to set

(*f*) 1 Ves. jun. 45.
(*g*) Beames' Ord.Cha 288.
(*h*) 1 P. Wms 299.
(*i*) 1 Sch. & Lef. 234.
(*j*) 3 Ves. 386. 13 Ves 564.

aside the decree *for fraud* (*k*); or a *bill of review*, which lies against those who were parties to the original bill, and against them only (*l*); and must he either *for error* IN LAW, *apparent on the face of the decree*, or *on some new matter which came to the knowledge of the party* AFTER PUBLICATION (*m*).

In the former instance, the bill may be filed without leave of the court; but for a bill of review, grounded on the discovery of new matter, a petition to the court, supported by a strong affidavit of the recent discovery, is necessary, together with a deposit of 50*l.* (*n*). A party cannot, upon a bill of review, assign for error matter of form only, or of abatement (*o*); for it is too late to take advantage of these defects, when the decree is perfected, and *substantial* justice administered: neither can he object, that any of the matters decreed are *contrary to the proofs in the cause* (*p*), for this relates to the facts rather than the law; and a fact misunderstood by the court, may be a ground for an ap-

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(*k*) 3 Atk. 811.

(*l*) 3 Chan. Rep. 94.

(*m*) 2 Freem. 178. 3 P. Wms. 371. 3 Atk. 35.

(*n*) 2 Atk. 138. 2 P.Wms. 233. 16 Ves. 348.

(*o*) 3 Bro. P. C. 305. 1 Chan. Ca. 122. 1 Eq. Cas Abr. 164.

(*p*) 1 Vern. 166. 2 Ball & Beatty, 154.

peal, but not for a bill of review. And the reason for this is, that the object of a bill of review is to give the court an opportunity of correcting a *manifest* error, into which it may have been inadvertently led, or *unavoidably*, from the want of the entire evidence in the cause, so as not to oblige the party aggrieved to resort to an appeal to parliament; and not to call upon the court to reconsider a deliberate opinion, which has already received the last solemn sanction of the law, by being recorded. The bringing this bill does not impede the execution of the former decree; and on the contrary, a person is not allowed to file a bill of review, unless he has performed the decree to the utmost of his power; and if the decree be for the payment of money, he must pay it, or give security, although it should afterwards be ordered to be refunded (*q*). A bill of review lies only for him *against* whom there has been a decree (*r*); and none but parties or privies can have it, since nobody else can be aggrieved by such decree; because it can only be revived upon such privies: but if it be for error apparent on the face of the decree, a person not a party, but whose rights are injured by it, may file the bill (*s*).

(*q*) 1 Chan. Ca. 42. 2 Freem. 172. 1 Vern. 117.

(*r*) 2 Freem. 182, 183. Chan. Ca. 51.

(*s*) 4 Ves. 564.

The usual defence to this bill, when brought for error apparent, is by a plea of the decree, and a demurrer as to the errors assigned (*t*); which being set down to be argued, the court proceeds to affirm or reverse the decree: or if the bill be brought on new matter, fitting to be answered, the defendant must put in an answer, or plead thereto; and the prevailing party takes the deposit of fifty pounds. Twenty years after the pronouncing of the decree, is the limitation for a bill of review (*u*).

(*t*) *Vide post*, Part II. cap. 4. sec. 3.

(*u*) 5 Bro. P. C. 466. 6 Bro. C. C. 395. 3 Bro. C. C. 639.

CHAPTER XV.

OF EXECUTION.

THE progress of a suit in Chancery being thus traced through its several stages, to its final completion in the decree; it remains now only to add a few words upon the manner of enforcing decrees, or the process of *Execution.*

The ancient and regular course of the court is, *after the decree is signed and enrolled,* to issue a *writ of execution* against the defendant. This writ recites the decree, and commands the performance of it: it must be served *personally* on the defendant; but service may be substituted on his clerk in court, by motion, supported by an affidavit of sufficient grounds (*a*). If, after service of the writ, the defendant refuses to perform the decree, the usual process issues as in other cases of contempt. On the return of a

(*a*) 12 Ves. 203.

distringas against a corporation, a sequestration issues immediately, without an *alias* and *pluries distringas*; and if the company have no goods, the members are liable individually (*b*).

But it having been found extremely inconvenient to be obliged to run through the entire process, as for want of an appearance; and as the *writ of execution* cannot be sued out till after enrolment, by which the defendant had frequently an opportunity of absconding, it became the usual practice (and now almost universal), immediately on the *passing* and *entering* of the decree, to obtain a short order, that the defendant should comply with the terms of the decree, within a given period, or that a serjeant at arms should go against him.

If the serjeant at arms returns '*non est inventus*,' a sequestration issues; and the rents, issues, and profits, together with the goods of the defendant, are applicable to the liquidation of the complainant's demand, under the direction of the court (*c*); in which respect it differs from the sequestration on mesne process. A sequestration will also issue on the return of an attachment, that the party is in the custody of the

(*b*) 2 Vern 896.

(*c*) 2 Atk 23. 1 Dick. 106.

warden of the Fleet: because the imprisonment is for the contempt; the sequestration in satisfaction of the decree (*d*). A person claiming under a title paramount, may be examined upon interrogatories before the master '*pro interesse suo*' (*e*); or if the question to be tried is pure matter of title, the court will give him leave to bring an ejectment, with proper directions to protect the possession. If by the master's report it appears that goods were taken, the property of another, the court will order them to be specifically restored; and a reference will be made to ascertain his damages (*f*). Exceptions cannot be taken to the report, because the suit is concluded by the decree; but if objectionable, the report should be set down on further directions (*g*).

When the decree or order is for the performance of some specific act—as to deliver up deeds and papers, or to answer on interrogatories, or such like; and the defendant, being in custody, still persists in his contumacy, the complainant may have him brought into court by '*habeas corpus*,' and admonished; and the court may set a fine upon him, and award process to the

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(*d*) 18 Ves. 314. 3 P. Wms. 240.

(*e*) 9 Ves. 335.

(*f*) 3 Ball & Beatty, 57.

(*g*) 1 Dick. 94.

sheriff of the county, where his estate lies, to levy and pay it into the Hanaper; and may order him to be kept a close prisoner (*g*). An escape warrant lies by stat. 5 Anne, c. 9, in respect of persons who have been committed for non-performance of orders or decrees.

So far the proceedings are '*in personam*' merely; but if the decree be '*in rem*,' as for the delivering up of an estate, the complainant may obtain an order for an injunction, commanding the possession of the lands to be yielded up to him, according to the decree pronounced in the cause; and the court will grant a commission to the sheriff, to put the party in possession, together with a *writ of assistance*, if required, commanding the sheriff to aid and abet in so doing with the power of the county (*h*). But if the complainant has not made all the persons deriving an interest in the lands, parties to the suit (unless their interest was acquired pending the cause), he must proceed at law to recover the possession; for none but parties in the cause can be affected by the decrees.

(*g*) 4 Bro. C. C. 30.

(*h*) Harr. Chan. Prac. 333. 3 P. Wms. 379.

CHAPTER XVI.

OF SUPPLEMENTAL PROCEEDINGS, AND SECONDARY BILLS.

BEFORE we conclude this review of the practice of the court of Chancery, it will be necessary concisely to advert to the nature of the proceedings on *Supplemental Bills* and *Bills of Revivor;* which being incidental, and secondary only to the original suit, could not, with convenience, be treated of in the former part of the work.

SECTION I.

Of Supplemental Bills.

A Supplemental Bill, properly so called, is a bill filed for the purpose of supplying a defect, which has arisen in the progress of the suit, by the happening of some event *subsequent* to the filing of the original bill. We have already seen, that if the complainant discovers any *original* deficiency in his bill, he is at liberty, up to

the time of joining issue, to cure the omission by amendment; and that for the purpose of merely adding formal parties, the amendment may be made at any period of the suit. If, however, such parties are rendered necessary, by any circumstance having occurred after the bill filed, there must be a supplemental bill (*a*).

After the pleadings on both sides are closed, the complainant cannot remedy an original deficiency in his bill by amendment; because that would be to open the whole anew; and would be productive of great irregularity and confusion. But if, at such a stage of the proceedings, he should discover any imperfection in his bill—as that he requires further discovery, or to put new matter in issue, he will be at liberty to resort to a supplemental bill for that purpose.

Thus a supplemental bill is merely *in continuation* of the original suit, and filed for the purpose of filling up such a deficiency as does not cause a material alteration in the matter in litigation, or a change of the principal parties; and when therefore it is only requisite to *add* something to the *former* proceedings, in order to attain complete justice: and this is the essential difference between supplemental bills and origi-

(*a*) Mitf. 49. 3 Atk. 217.

nal bills, in the nature of them; the latter being, to all intents and purposes, the commencement of a new suit, which, nevertheless, may in its consequences draw to itself the advantage of the proceedings on the former bill (*b*). A supplemental bill may be filed, even after a decree has been made in the cause; and it may be either in aid of the decree, to carry it into execution, or to have further directions (*c*); or it may seek to alter it, as on a rehearing, which is the peculiar case of a supplemental bill in the nature of a bill of review, already mentioned; or it may be added to a bill of review, where the circumstances require it.

In general, the supplemental bill must pray that *all* the defendants must appear, and answer to the charges it contains; but if the defect in the suit is occasioned by an alteration, or acquisition of interest happening to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited against such person alone; and may pray a decree upon the particular supplemental matter alleged against that person only, unless the interests of the other defendants may be affected by that decree (*d*). Where the supplemental bill is

(*b*) Mitf. 78.

(*c*) 3 Atk. 133.

(*d*) Mitf. 59.

filed merely to bring formal parties before the court, the parties to the original bill need not be made parties to the supplemental bill (*e*).

When the answers have been put in, and the proceedings on the supplemental bill have arrived at the same point at which the original bill stood, they then proceed *pari passu* together; and the cause must be heard upon the supplemental bill at the same time that it comes on to be heard upon the original bill. But if the supplemental bill is filed after the hearing or decree on the original bill, the cause must be again heard on the supplemental matter; and if it be in *aid* of the decree, directions are given that the new matter should be connected with the former decree. In general, on a bill to *carry a former decree into execution*, the court will only enforce, and not vary the former decree (*f*); but where a bill is brought to *have the benefit of a former decree*, the court may examine the justice of the original decree; but then it must be upon the proofs taken in the cause wherein that decree was made, and the complainant cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause (*g*). Where a supplemental bill, after a

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(*e*) *Ibid.*

(*f*) Mitf 75.

(*g*) 2 Vern. 109 1 Ves 245.

decree, brings a *new* person or a *new* interest before the court, it is open to the parties to make any objection to the decree that might have been made at the first hearing (*h*).

When the supplemental bill is in the nature of a bill of review, which is, where new matter is discovered since the hearing, which might induce the court to alter or reverse its former decision before the decree is signed and enrolled; a *petition of rehearing* is filed with it, and the cause brought on upon both together. This last kind of supplemental bill partakes so far of the nature of a bill of review, that it is necessary to obtain leave of the court to file such bill; and the same affidavit is required for this purpose, as is necessary to obtain leave to file a bill of review on discovery of new matter, together with the usual deposit of fifty pounds (*i*).

When a supplemental bill is filed *after publication*, for the purpose of putting new matter in issue; if there be no proof to the new matter the bill must be dismissed; but it would be irregular to examine witnesses to a matter *that was in issue*, and not proved in the original cause; and such proofs would not be suffered to be read at

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(*h*) 3 Bro. C. C. 392.

(*i*) *Vide ante*, p. 171. 2 Atk. 138.

the hearing (*j*); for the same reason that where parties are added by amendment, *after publication*, the cause as to such parties must be heard on bill and answer only.

SECTION II.

Of Bills of Revivor, and in the Nature of Revivor and Supplement.

If in the progress of a suit, any of the *principal* parties should die (*k*); or a *feme* plaintiff marry(*l*) (whereby she can no longer sue); or any other event should occur by means of which the original suit falls to the ground, in consequence of there being no longer before the court any person by or against whom the suit can be continued; the court will in such case permit a bill to be filed by or against the person who comes in, *in the same right* as the original party, and *whose title cannot be controverted*, praying that the suit and the proceedings upon it may be restored to the same plight and condition, as for or against the new party, in which it stood with respect to the original party through whom the

(*j*) Vin. Abr. tit. Chan (R. A.) Ca 8. 9.

(*k*) 2 Eq. Ca. Abr. n. 1. in marg.

(*l*) 1 Vern. 318. 1 Ves. 182.

abatement was caused. Such bill is termed a Bill of Revivor, and can only be had by or against the heir, executor, or administrator of a deceased party, or the husband of a feme plaintiff; for they alone come in by *a title that cannot be litigated.*

The reason why the court will allow the former proceedings to be revived in this case, is, because as the new party comes in *in the same right* as the original party from whom he claims, he is clothed with all the rights, and subject to all the duties, to which the former was liable, and is bound by his acts; consequently, the original suit remains, in all particulars, unaltered, except by the substitution of a party, who being the representative of the original, *may* therefore claim the benefit of the former proceedings; or who, if a defendant, is bound by the acts of his predecessor, and cannot therefore make a new defence. It would be useless, therefore, to compel the parties to commence the whole suit '*de novo*', and retrace the same steps; but, the complainant may either revive, or file a new original bill, at his option (*m*).

A bill of revivor strictly puts no question in issue between the parties, but is rather in the

(*m*) 1 Vern. 463. 3 Atk. 486.

nature of a *petition* to have the suit revived; and it differs only from a petition in this, that it brings new parties before the court. But a bill of revivor may in some cases require an answer; as where the defendant is called upon to admit assets come to his hands; or he may be called upon to answer the original bill, when that had not been done by the original party. If, therefore, a person comes in, who, though *standing in the same right*, claims *by a title that may be disputed*, and, consequently, must be put in issue; there cannot be, in such case, a bill of revivor. Thus, for example, a devisee cannot bring a bill of revivor in right of his testator, but he may file an original bill, stating the former proceedings, *charging the validity of his title*, and praying thereupon to have the proceedings revived; and if his title, thus put in issue, be either admitted or proved, he is then entitled to all the benefit of a revivor. This therefore is termed, *an Original Bill, in the nature of a Bill of Revivor.*

Again, if the property which is the subject of litigation, be entirely transferred from either of the original parties to a third person, who does not hold *in the same right*, as in the case of succession to a benefice, here the suit is at an end; as the party by or against whom it was carried on, is out of court for want of interest; and it cannot be continued for or against the new party

in whom such interest is vested, by bill of revivor, because *the title may be litigated;* nor yet by *an original bill in the nature of a bill of revivor,* because, as the new party does not come in *in the same right* as the original party, he is not bound by his acts; nor is he entitled to the same claims, or subject to the same duties, except so far as he is placed in a *similar* position with his predecessor. In such case, therefore, there must be an entirely new suit commenced, which has relation to the original suit only to the extent, that insomuch as it agrees with the former circumstances, the court will make similar orders; and in this respect it is termed *an Original Bill, in the nature of a Supplemental Bill.*

In all these cases, however, the parties we allude to must be the *principal* parties; for when any event occurs which causes a change in *formal* parties, such as trustees, or in parties who have but a secondary or remote interest in the subject of litigation, and who must therefore be brought before the court in order to have a complete decree; this being only a defect arising in the original suit, may be supplied by a supplemental bill merely. But if such *formal* parties happen to be *principal* parties likewise, as in the case of persons carrying on a suit *en auter droit,* such as assignees under a commission of bankrupt,

then the death or removal of these parties will cause an abatement of the suit. The new bill, therefore, to bring their successors before the court, will be *supplemental* in respect of their being *formal* parties; and in the nature of a bill of revivor, in respect of their being *principal* parties; and is therefore termed *a Supplemental Bill, in the nature of a Bill of Revivor.*

A bill of revivor being a petition for the restoration of an abated suit, with *all* its proceedings, must not pray that *part* only of these proceedings shall be revived, but the whole will be restored to the condition it stood in when the abatement happened (*n*). Proceedings in cross causes are not revived without a bill of revivor in each, except as to any matter of account decreed; when both parties being equally interested, a bill in one cause praying the whole may be revived, revives the whole (*o*). This then being the sole object of the bill, it must not contain more new matter than is necessary to shew a title to revive; and any thing beyond that would be demurrable (*p*). Much less must it contain any variation from the original bill (*q*). But the omitting a complainant to the original

(*n*) 2 Chan. Ca. 80. Gilb. For. Rom. 174.

(*o*) Hinde, 51. Gilb. For. Rom. 174.

(*p*) 2 Eq. Ca. Abr. in margin.

(*q*) Hinde, 48.

bill, and stating the reasons of such omission, (as that he had executed a release to his co-plaintiffs (*r*),) or the omission of a defendant who had not answered (*s*) the original bill, is not considered such a variation as to vitiate the revivor. Where the bill of revivor requires an admission of assets from the representatives of the deceased party, or otherwise that an account may be taken of what has come to their hands, this is merely part of the case necessary to shew the *title* to revive; and if the representatives do not admit assets, the cause must be heard on the bill of revivor, that the amount of the property of the deceased party, answerable to the demands of the suit, may be ascertained; and so far the bill is in the nature of an original bill.

If a complainant refuses to join his co-plaintiffs in a bill of revivor, he must be made a defendant, and the reason stated (*t*); and this, *ex necessitate rei*, is not such new matter, or such a variance, as is demurrable. In like manner, if the interest of the deceased is severed, so that part is vested in his *heir*, and part in his *personal* representative, a bill of revivor may be filed for either, in part only, so far as his interest is

(*r*) 2 Chan. Ca. 80.
(*s*) 1 Vern. 308.
(*t*) 1 Eq. Ca. Abr. 2. 11 Ves. 306.

concerned; or the suit may be revived as to part by one bill, and as to the other part by another (*u*). So also in the case of a bill by creditors on behalf of themselves and *other creditors*, any creditor, though not a party to the original bill, is entitled to revive (*v*); and these are not such variations as can be demurred to, for they do not in any way alter the nature of the matter in litigation between the parties. Should any new matter, however, arise in consequence of the abatement, which ought to be put in issue, or any alteration ensue necessary to be stated, this may be done by a supplemental bill added to and made part of the bill of revivor; which is thence called *a Bill of Revivor and Supplement*. So, likewise, amendments may be made after a revivor, when the proceedings are in such a state as to admit them; and the new party will be called upon to answer the amendments in like manner as he must put in an answer where the original party had died without answer, or after exceptions allowed. Where the original party has pleaded to the bill, and dies before the plea is argued, the representative must plead *de novo*, for the first cannot be argued then (*w*).

(*u*) Mitf. 63. 1 Eq. Ca. Abr 3—4.

(*v*) *Ibid.*

(*w*) Harr. 77.

If the party whose death has caused the abatement, be a complainant, his representative must bring all the original parties before the court; if a defendant, then the suit is revived against his representative only, the suit not having abated with respect to the remaining parties. Of course it can only be the interest of a party *complainant*, to revive the suit; but after a decree pronounced, it may be for the benefit of a defendant, or those claiming under him, to have the decree revived; and he will be at liberty to do so, if the complainants neglect or refuse to revive it (*x*). It is not competent, however, for either party to revive a suit merely for costs; for this is *actio personalis et moritur cum personâ* (*y*). But if the costs have been *taxed*, and the *report made* in the lifetime of the party, this makes it a judgment debt, and the representative may revive (*z*). In an injunction cause, if the suit abates, the defendant may move that it be revived within a stated time, or that the injunction be dissolved; but he cannot himself revive, merely for the purpose of dissolving the injunction (*a*). In an information with a relator, if the relator should die, the court will suspend

(*x*) 10 Ves. 406. 12 Ves. 317. 1 Meriv. 154.

(*y*) Gilb. For. Rom. 181.

(*z*) 2 Ves. 462. 2 Meriv. 116.

(*a*) 12 Ves. 311.

further proceedings, until another relator be appointed (*b*).

In a bill of revivor merely, the defendant must appear, in a town cause, in four days exclusive; and in a country cause, in eight days, exclusive of the service of *subpœna;* or in default, process of contempt may be issued. Where it is necessary to make a former defendant a party to the bill of revivor also, although he has appeared, and answered the original bill, yet if he cannot be found, to be served with a *subpœna* to the bill of revivor, the complainant must proceed under the statute 5 Geo. II, c. 25, to have the bill taken *pro confesso* (*c*); and service of the *subpœna* to revive, on the clerk in court in the original cause, will not be allowed (*d*). The defendant has eight days allowed him after appearance, to shew cause against the revivor, and to put in an answer, if it be required. If no cause be shewn, the suit may be revived on motion, as a matter of course, upon an allegation, that the time allowed for the defendant to answer, by the course of the court, is expired, and that no cause is shewn against the bill (*e*); and this, whether the defendant answers, or not;

(*b*) *Vide* note to 1 Swanst. 305.

(*c*) 2 Bro. C. C. 127. 1 Dick. 63.

(*d*) 2 Dick. 545.

(*e*) 3 P. Wms. 348.

for though the defendant should insist, by way of answer, that the complainant has no title to revive, the court will notwithstanding, on motion, order the proceedings to stand revived, and refer the question, of the validity of the cause shewn, to the hearing; since the defendant has thought proper to submit to the suit by answering. But if, at the hearing, the complainant does not shew he has a good title to revive, he will take nothing by his suit (*f*). When, therefore, the defendant can shew cause against the revivor, as that the new party is not the heir, &c.; or that he has not the like interest or the like cause of complaint, as in the former suit; or that the defendant is not the person subject to the demand; the proper mode of making the objection is, by plea or demurrer; on the argument of which the preliminary question will be disposed of (*g*).

Where a suit in equity abates by the death of the complainant, his executor or administrator must revive within six years, otherwise the statute of limitations may be pleaded, except where there has been *a decree to account*, in which case a bill of revivor is considered in the nature of a *scire facias*, and not within

(*f*) Mitf. 61.

(*g*) 3 P. Wms. 348. Mitf. 234.

the statute of limitations *h*). And, in general, a bill of revivor lies not upon a decree of long standing, *viz. thirty years;* but the party may exhibit an original bill, and set forth the decree as evidence (*i*). Notwithstanding an abatement by death, the court sometimes, with the consent of all parties interested (*j*), orders collateral things to be done, such as the delivery of deeds and writings, or money to be paid out of the bank, without a revivor; but this is only done where the court must deliver itself from the custody thereof, and proceed *ex-officio* (*k*). Revivor upon revivor lies until the interest of the thing in question be determined (*l*).

(*h*) 1 P. Wms. 742.
(*i*) 2 Chan. Ca. 216.
(*j*) 2 Ves. 400.
(*k*) Eq. Ca. Abr. 2. 1 Ves. 185.
(*l*) Hard. 201.

PART THE SECOND.

CHAPTER I.

OF PLEADING IN GENERAL.

"And know, my son, that it is one of the most honourable, laudable, and profitable things in our law, to have the science of well pleading; and therefore I counsaile thee especially to imploy thy courage and care to learne this."

LITTLETON.

THE science of pleading has been so long regarded, by those who are ignorant of its true nature and objects, as a system invented for the purpose of evasion, and the perversion of justice; an opinion which is, unfortunately, countenanced by the frequent miscarriage of causes, upon small and trivial niceties in pleading (*a*), that it will be necessary for us to enter into the consideration of pleading in general; its use and de-

(*a*) Hale's Hist. Com. Law, 212.

sign; in order to rescue it from undeserved obloquy, and to endeavour to remove from the mind of the pupil, the unfavourable impression he is apt to conceive, on his first entrance upon the study.

From the number of minute and intricate rules laid down in the Treatises on this subject, collected from decisions in an infinite variety of cases, the compilers of which consider it quite sufficient to refer to the authorities, without stating the reason upon which the rule is founded; the student finds himself involved in a net of inextricable difficulties and niceties, for which he in vain seeks for a solution. He is terrified in approaching a subject, which, at first sight, seems necessary to be committed to memory, in order to be mastered: he is in despair when he observes its complication and minute magnitude; and he too often throws it up in disgust, from supposing that substantial justice is, in many instances, intercepted by mere technical, and, to him, apparently unmeaning forms. Add to this, that from the abuses that from time to time have crept into the system, "special pleading" has been long a bye-word for sophistry, and the splitting of straws. We cannot, therefore, be much surprised at the number of prejudices to be overcome, on commencing the study of this branch of the profession, that so few ever

become acquainted with its real principles; and that so little has been done towards bringing back the science to that ancient simplicity and perfection to which it had attained in the reign of Edward the Third (*b*).

It will be our business, then, to make an effort to justify the encomiums of Littleton upon it; and to prove, as Lord Mansfield says, that the "substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained:" "but which (as he remarks in the same case) by being misunderstood, and misapplied, are often made use of as instruments of chicane" (*c*). To this purpose we must commence, by endeavouring to arrive at a clear and precise notion of what it is a man does, when he is said to bring an action, or institute a suit against another. When a person feels himself aggrieved, and cannot otherwise have redress, he applies to the law to interpose its authority, in order to restore to him a right that is withheld; or to give him reparation for an injury sustained. But the law will not interfere by its ministerial officers, upon the bare suggestion of injury: it requires that the wrong shall be prov-

(*b*) *Vide* Hale's Hist. Com. Law Co. Litt. 304, b. (*h*).

(*c*) 1 Burr 319.

ed, and the right substantiated: for otherwise it might be turned into an instrument of violence. For this purpose courts of judicature have been erected; where the claims of the parties may be contested, and the judgment of the law ascertained, before its sanction is awarded. The courts of law have, on their part, laid down certain rules, and formulæ of proceeding, which long experience has taught to be the best adapted to the purpose of arriving at a speedy and just decision; a departure from which rules, must occasion great inconvenience, and sometimes a manifest defect of justice (*d*). Hence causes are frequently delayed, by the raising of mere technical, and, to a common observer, frivolous objections. And though this is an evil much to be regretted, it is one that arises more from the ignorance of practisers, than from any inherent blemish in the laws (*e*). This is an observation which applies with peculiar force to pleading, the propriety and utility of the rules in which,

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(*d*) *Sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut ratione actionis errare possit.*—*Cic. Pro. Q. Rosc.*

(*e*) 1 Bos. & Pul. 59; where it is observed by Eyre, Chief Justice, that "infinite mischief has been produced by the facility of the courts, in overlooking errors in form: it encourages carelessness, and places ignorance too much upon a footing with knowledge, amongst those who practise the drawing of pleadings."

are not always so discernible as in the other branches of practice.

SECTION I.

Analysis of the Pleadings at Common Law.

Upon complaint being made to a court of justice, its first step is to summon the defendant to appear, and answer the allegations made against him. As it would be contrary to justice to pronounce an opinion '*alterâ parte inauditâ.*' The defendant thereupon comes and contests the plaintiff's right, either by disputing its legality, or denying the facts; or some particular fact, on the ground of which such right is claimed; or alleging, on his own behalf, such matter as would operate to avoid the plaintiff's demand, by shewing that no cause of complaint existed; or if it once existed, was subsequently removed. These are such answers as go to the *merits* of the point in dispute. But independently of these, there are *preliminary* objections which may be taken, to excuse the defendant from entering into any contest about the matter;—as, that the court, applied to by the plaintiff for relief, is not the one proper to take cognizance of the suit; or that the plaintiff is, for

some reason foreign to the cause of action, not entitled to claim the assistance of a court of justice: or, lastly, that there is some defect in the mode of proceeding, which would ultimately render the interference of the law abortive.

These disputations of the parties were originally delivered "*ore tenus*" in court, and were noted down by the officer, that the court might understand what was the real point of controversy. And if any objection arose upon the law of the case, it was at once decided on argument; if the dispute turned upon a question of fact, it was sent to be ascertained, according to its appropriate mode of trial. In process of time, however, as the business of the courts increased, the parties were sent out of court, to settle among themselves the terms of the question upon which the judgment of the court was demanded, or the verdict of a jury required; and thenceforward the counsel on both sides drew up, in writing, the several allegations and answers of their respective clients, until, in the course of the altercation, they arrived at some disputed point of law, or some material fact, distinctly alleged on one side, and denied by the other; for not until then did they require the assistance of the court or jury. These preliminary disputations of the parties are termed *Pleadings*; and the point to which they arrive, is called the *Issue*.

The foregoing view at once furnishes us with the true end and design of pleading; which is nothing more than to disencumber the question at issue between the parties of all irrelevant and perplexing matter; that so the court and jury may be saved from embarrassment, by having the points submitted to their consideration distinct and material; and that the parties themselves may be spared the trouble and expence of unnecessary litigation. This accords with what Sir Mathew Hale says of "the art or dexterity of pleading;" which, as he expresses it, in its use, nature, and design, was only to render the fact plain and intelligible, and to bring the matter to judgment, with a convenient certainty (*f*).

The student will observe, that the rules of pleading, how complicated or abstruse soever they may appear, are all built upon the foundation of this single principle, and all aim at the accomplishment of this one object. It may seem extraordinary to some, how so plain and definite an object could ever be lost sight of, in stating the claims of the conflicting parties; or that a principle so obvious could give birth to a system of rules, upon which volumes have been expended: but whoever will reflect upon the

(*f*) Hist. Com. Law, 212.

many arguments which arise in ordinary conversation, and how few of them are ever brought to any conclusion, solely in consequence of the disputants travelling out of the true point in debate, will cease to be surprised at the first; and when we come to consider that the most abstruse and extensive sciences are founded upon data, comparatively few and simple; and that pleading is in fact a very important branch of Dialectics, or the art of Right-Reasoning, we shall no longer be astonished at the complication and variety of its rules; which, in reality, are no more than a counterpart of the rules laid down in the system of logic. Of this we shall have occasion to speak more at large by and bye. These rules, when properly understood, are all conducive to the same end; and are perfectly intelligible, when referred to the principle above stated. It is only when they are regarded as so many independent propositions, and grounded upon mere authority (in which light our writers on pleading are too much accustomed to treat them), that they appear to the student as an arbitrary and unmeaning collection, calculated to involve and embarrass the real justice of every case.

We shall now proceed to shew the application of these principles to the several pleadings on either side, taking each of them separately as they occur on the part of the plaintiff and de-

fendant: and first, of the *statement of the injury* suffered by the plaintiff, and his *application for redress.* Here then are two points to be considered:—first, the nature of the wrong sustained, and how it is to be set out; and, secondly, the plaintiff's right to make the application to *the particular court,* and the form of such application. Of each of these in their order:—

I. First, as to *the statement of the injury.* "Wrongs convey to us an idea merely negative, as being nothing else but a privation of right"(*g*). In complaining of a wrong done to him, therefore, the plaintiff does nothing more than set out a *right* of which he has been deprived. This leads us to the consideration of rights, which are nothing more than legal or equitable, incidents flowing from legal or equitable relations. To prove a right, then, the *relation* in which it is founded must be distinctly shewn. And here we must premise, that, in speaking of relations, we allude more particularly to such as arise *ex contractu,* and are the foundation of actions of that nature, as being more analogous to cases in equity, and quite sufficient for the purposes of illustration. Relations, again, let in three separate considerations:—first, the par-

(*g*) 3 Blacks. Com. 2.

ties with their several disabilities and liabilities in law; secondly, the subject matter, or contract, with the circumstances under which it was made; and, lastly, the legal and equitable incidents or rights, the withholding of any of which is the cause of complaint. Who, then, that for a moment reflects upon the vast and diffusive field of controversy which this includes, can be surprised at the difficulty attendant upon the preliminary arrangement of the points in litigation; or the number of minute regulations that have, from time to time, been found necessary to be adopted, in order "to render the fact plain and intelligible; and to bring the matter to judgment with a convenient certainty."

Hence we see that the *statement* of the injury is composed of these three points:—the setting forth the relation between the parties;—the right accruing by such relation;—and that such right is withheld. This entirely agrees with the ancient view taken of a declaration at common law, which was said to consist of three parts—the demonstrative, the declarative, and the perclose or conclusion, '*unde deterioratus est* (*h*). Here the *demonstrative* part, which states the names of the parties, and the *nature*

(*h*) Heath's Max. 2.

of the action, corresponds with the setting forth of the right; because at common law certain actions were given for certain injuries; the *declarative* part, which explains the *cause* of action, is equivalent to the shewing the relation between the parties: and the *perclose* is the complaint of injury sustained. The first, and principal point, therefore, with the plaintiff, is to shew his right; and however complicated and diffuse the statement in a declaration at common law, or a bill in equity, may appear, it is nevertheless reducible to two propositions, declarative of such right. The *first* proposition states the rule of law, that a certain right flows from a certain relation. The *second*, that the parties stand in such relation.

1. The *first* is proved—1st, by act of parliament, on which turns the question of construction: 2d, by precedent, on which turns the meaning and extent of the rule gathered from the precedent: 3d, by analogy, where a still more general rule is to be collected, from a variety of analogous cases, or from the universal principles of equity itself.

2. The *second* proposition is founded on the facts of the case, as stated in the declaration at common law, and the bill in equity. But these statements may be untrue, or inadequate. Their truth, which is a question of fact, is decided by

the verdict of a jury, at common law; and in equity, by written depositions, and the defendant's admissions upon oath. But, 2dly, the facts, though proved to be true, may be inadequate to sustain the assumed relation. As if, for instance, a man, who claimed some duty arising from the relation of copartnership, were unable to prove a contract for the participation of *loss* as well as profit (for without such essential ingredient, it would not be a copartnership concern) (*i*), he would thereby fail to establish the relation on which his claim was founded: and this is frequently the ground of nonsuit at law, and of dismissing the bill in equity. This point of adequacy, is purely a question of law; and is proved by shewing that the case made out has all the essential qualities of the assumed relation; or in other words, that the facts proved, bring the case within the application of the rule of law, laid down in the first proposition. The conclusion here is as much demonstration, as any theorem in pure quantities.

II. Next, as to *the application for redress:* although every man who has suffered wrong, is *primâ facie* entitled to redress in a court of justice,

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(*i*) *Vide* Hesketh *v.* Blanchard, 4 East, 144.

yet as the law has established for the convenience and dispatch of business, several distinct and independent judicatures, with exclusive jurisdiction, the plaintiff must take care to bring his action, or commence his suit, in such court as has authority to take cognizance of the wrong complained of; otherwise, besides the general inconvenience that would result from an opposite course, great injustice might be done to the defendant, if he were obliged to contest the right in an incompetent court, for want of adequate means of defence.

Secondly, there are certain disabilities, some of which are only temporary, imposed by law, which restrict those who are subject to them from suing in a court of justice; and, on the other hand, there are certain privileges attached to individuals in particular capacities, which exempt them from liability.

Thirdly, as the courts have, by a series of decisions, laid down a system of proceedings which experience has proved to be the best calculated to attain the ends of justice, the application for redress must follow the established forms, that the defendant may at once know what, and how to answer. The complaint must likewise be so framed as that the whole question, and between all the parties, may be brought

before the court; since, otherwise, the defendant would be harrassed by uselessly contesting a suit, in which complete and ample justice could not be finally administered. And, lastly, we may add under this head, that no man is permitted to sue another, while a former suit for the same cause of action is pending, either in the same or any other court of competent authority. "*Nemo debet bis vexari pro eâdem causâ.*"

We now come to the pleadings on the part of the *defendant*, or the answer which he gives to the complaint made against him: and here an obvious distinction presents itself, corresponding with the division we have made of the complaint, into the *statement of the injury*, and the *application for redress*. The defendant either directly answers the *statement of the injury*, by denying it altogether, or by confessing and avoiding it; or, secondly, if there be any objections to the *application for redress*, founded upon the reasons specified in the preceding section, he states such as a ground why he should not be further called to account, at least until the disability be removed, or informality rectified. The former are called *Pleas in Bar*, and go to the merits of the cause. The latter are termed *Pleas in Abatement*, their sole effect being to set aside the complaint; and are some-

times distinguished by the appellation of *Dilatory Pleas*, because their operation, for the most part, is only temporary.

I. As, therefore, pleas in abatement being merely objections to entering into the "*litis contestatio*," must precede the "*litis contestatio*" itself, we shall commence our observations with them; and, in point of fact, a defendant, after putting in a plea in bar, cannot plead in abatement; for, by submitting to answer the substance of the complaint, he waives all preliminary exceptions, which might have been taken to the mode of application. The several species of pleas in abatement are conformable to the subdivision we have noticed in the application for redress.

1. First, therefore, if the suit be instituted in a court which has not competent authority, the defendant may state that circumstance as a reason why he should not answer to the cause of complaint; and this kind of dilatory plea is called *a Plea to the Jurisdiction*.

2. Secondly, the defendant may allege in abatement of the suit, either, first, a legal disability on the part of the plaintiff, disentitling him from seeking the assistance of a court of justice; or some privilege of the defendant, which saves him from responsibility. Of these, some are only

temporary, and are the proper subject of abatement; others, again, are permanent, and take away all right of action *at any time*. These latter, therefore, are of an amphibious character, and may be pleaded in bar as well as in abatement; for it is manifest that these latter may be considered as an answer to the very cause of action, by annulling the relation between the parties. This second species of pleas in abatement are termed *Pleas to the Person*; and under this head may be classed such pleas as state that the plaintiff is a fictitious person, or dead.

3. Thirdly, If there be any defect in the mode or form of proceeding adopted by the plaintiff, arising from mistake or want of certainty in his statement of the cause of action, in consequence of which the real merits of the question cannot conveniently be enquired into; or when enquired into, cannot lead to any satisfactory result: the defendant may take advantage of it, by pleading the same in abatement of the complaint. The plea of want of proper parties, is a plea of this nature; as also the plea of the pendency of another action for the same cause. Pleas of this last kind are strictly *dilatory* pleas, and have this quality annexed; that where the deficiency is in a point which comes more properly within the knowlege of the defendant, he must give the

plaintiff a better form, *i. e.* at the same time that he states the error, he must shew how it may be corrected, as, for example: when he pleads a misnomer, he must give the real name; for justice must not be eluded by any frivolous evasion. These pleas are "κᾶτ 'εξοχῆν'" called *Pleas in Abatement*, because they go particularly to quash the form of proceedings, and conclude "*ut cassetur billa vel breve.*" The same objections, if they appear on the face of the pleading, may also be taken by *special demurrer*, which is the denial of the sufficiency of the pleading, in the particular matter *specified;* for this is a mere point of law, and does not involve any dispute as to fact.

II. Next, as to pleas in bar, or answer to the merits of the complaint, the substance of every complaint being, as we have already seen, the subtraction of some *duty or right* (these being correlative terms) derived from an existing *relation*, the only conclusive answer must be, either of the four following

Modes of Defence.

1. First, confessing the relation, to deny *the right;* and this is the general issue in law, and is called a demurrer; an issue being, as was

before stated, formed of an affirmative and negative (*k*).

2. Secondly, confessing that the right demanded would follow from the relation assumed; to deny generally the *existence of the relation*, which is the general issue in fact; or to deny some particular allegation, upon which the whole relation rests.

3. Thirdly, confessing the right and the relation, to deny the *subtraction*.

4. And, fourthly, confessing the subtraction, to give *some valid reason to excuse* the non-performance of the duty. The two latter are called *special* pleas in bar.

Again; *the reason assigned in excuse* may be two-fold, in reference to the two propositions, concerning the relation and the right. *First*, it may be *some new matter*, to *invalidate* the

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(*k*) It may appear startling, from its novelty, to class demurrers under the head of pleas in bar; but taking the definition of pleas in bar to be such answers as go to the gist of the action, demurrers are clearly a species; being the pleading which tenders an issue *in law*, as the general issue does *in fact*; and the general issue is confessedly a plea in bar. In reality, however, it matters little how the parts are distributed, provided the arrangement be intelligible; and that has been the principal aim of the present treatise.

primâ facie relation set out in the complaint: or *secondly*, it may be *some new matter* by means of which, supposing the *relation* to exist, yet the *right* derived from it is gone:—and here it is obvious, that the reason alleged must be of new matter; for if the same statement appeared on the face of the complaint, the defendant might at once deny the right; which, as observed above, would be a demurrer, or general issue in law. It has been before remarked, that relations may be considered with respect to the *parties*, the *subject matter*, and the *incidents*.

1. First, then, to *invalidate the relation*, the new matter may shew, *first*, that the *parties* were incapacitated from contracting the relation, or are incapable to continue it. *Secondly*, that the *subject matter* was insufficient, or illegal, or had undergone some alteration. *Thirdly*, that the *right*, being incidental, had not accrued.

2. Second, the new matter may shew that the *right*, though once existing, is barred, by the act of the *party*; by the act of *law*; or, lastly, by the act of *God*, or unavoidable calamity.

The student, upon examination, will find that every possible species of defence is included under the above heads, and may be referred to some one of the foregoing classes—a proof of the

correctness of the principles from which they are deduced.

Upon an attentive investigation of the *four modes* of rebutting the complaint just enumerated, it will be seen, that the fourth is in a great measure resolvable into the second; for it is manifest, that whatever matter is adduced to demonstrate that the relation is invalidated, or its incidents altered, will tend to prove that it is not the same as stated in the complaint, and therefore may be *denied generally:* and this, at first view, would appear to be the shortest course. In effect, many things which might be pleaded specially in excuse, are allowed to be given in evidence under the general issue, in avoidance of the claim (*l*). But there are three grand objects atchieved by special pleas; first, the law and the fact are kept distinct;—second, the issue is narrowed, by means of which the points to be proved in evidence are considerably diminished, and the parties saved expense;—and, third, the court and opposite party are apprized of the nature of the defence (*m*). Wherever the attainment of these three ends, therefore, is not materially obstructed, the court has given great

(*l*) *Vide* 1 Chitty on Pleading, 468.

(*m*) 1 Lord Erskine's Speeches, 275 to 278.

latitude in allowing the general issue to be pleaded.

From what has been said above, it is clear, that to constitute a sufficient answer to any material allegation in a pleading, the adverse party must either deny the allegation altogether, or *confess* the fact, and *avoid* the inference; *viz.* by setting up some new matter *consistent* with such allegation; but which, if true, is an answer to it (*n*). If, however, he set forth matter *inconsistent* with the allegation, by way of avoidance, this will not be sufficient, without a direct denial of the allegation. And this, for two reasons: first, because as the *inconsistent* matter is in effect a different statement, both statements may relate to distinct subjects, and so be both true (*o*);—and, second, such denial avoids prolixity, by tendering an issue at once; and gives the party an opportunity to prove his allegation.

A denial of this kind, prefaced by matter of avoidance, is called a *traverse*, and begins with the technical words "*absque hoc.*" The preceding statement is termed the *inducement* (*p*); and such

(*n*) 1 Saunders, 22, n. 2.

(*o*) *Vide* Bennett *v.* Filkins, 1 Saund. 23.

(*p*) Summary on Pleading, 75. 1 Saund 22, n 2. Chitty, 592. n. (*g*) and 690.

formal traverse is only necessary, when it is requisite to shew that the point traversed is material (*q*); otherwise a simple denial, according to the second mode of defence, will be sufficient (*r*). As the inducement, therefore, shews the materiality of the traverse, if the inducement be bad, the traverse will be insufficient. The inducement, however, cannot be met by a denial, because it is enough for the opposite party to prove his allegation true (which the traverse enables him to do), and then the inducement being of inconsistent matter, if relating to the same subject, must be false; or relating to a different subject, does not operate as an avoidance. This is the meaning of the rule laid down in the books, that 'a traverse cannot be taken after a traverse.(*s*)'

The immediate use and design of pleading is the formation of an issue; which Lord Coke defines to be "a single, certain, and material point, issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative" (*t*). As soon as this object is effected, therefore, in such

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(*q*) Com. Dig. Pleader, G. 20.

(*r*) 1 Saund. 103, b.

(*s*) 1 Chitty on Pleading 612. Com. Dig. Pleader, G. 17.

(*t*) Co. Lit. 126. a. (*q*).

a manner as to answer the whole of the precedent pleading, the matter is brought to a close; and the party who first arrives at that point is said to tender an issue, and concludes by praying the judgment of the court, if it be a question of law; or if it be a matter of fact he concludes to the country, *i. e.* he demands a trial by jury; or if it be a disputed record, he appeals to the record itself, and the adverse party joins issue by doing the like. On the other hand, when a pleading introduces new matter, by way of avoidance or excuse, it only concludes with a verification; because such new matter may be contested as to its validity in law, or its truth in fact; or the other side may adduce new reasons to invalidate it in turn. In this latter case, the pleadings must advance one step further.

Having taken this view, we shall now proceed to the plaintiff's reply to the defendant's plea, called his *Replication.* The replication being an answer to the plea, we shall consider it with reference to the *four modes* of defence already enumerated. It is manifest that the first two constitute issues, there being an affirmation on one side, met by a denial on the other. The replication in these cases, therefore, only joins issue.

The third mode of defence, namely, the denial of subtraction, is always put affirmatively, by averring a performance; because this is a proposition which admits of dispute both in law and in fact, and therefore the opposite side should have an opportunity of answering it; which is done by assigning a particular breach. This last mentioned replication bears a strong analogy to that which is called a '*novel assignment*'(*u*), *viz.* where the complaint not having been set out with sufficient precision, it becomes necessary, from the evasiveness of the plea, to re-assign the cause of action with fresh particulars.

It is, however, the excusing non-performance, (being the fourth mode of defence) which opens the widest range for replication. The statement of excuse may, like the statement of the right, be reduced to two propositions, and of a similar nature. The first proposition is—

That certain incidents superadded to the admitted relation, operate as a legal discharge to the otherwise resulting liability.

The second,—*That such incidents affect the acknowledged relation.*

(*u*) 1 Chitty on Pleading, 617. 1 Saund. 299, n. 6. Com. Dig Pleader, 3 M. 34.

Therefore, *That the defendant is discharged from liability.*

The *first* proposition here is a question at law, and may be met by demurrer: the *second* is a question of fact, and may be denied, or confessed, and avoided by a new shewing; or traversed, in a manner precisely similar to that which we have described at large, when treating of pleas in bar.

To the replication the defendant must again *rejoin*, by taking issue, or tendering issue, or adding new matter of avoidance; and so on, until the parties arrive at the true and simple point of controversy.

This will suffice to convince the student, that the rules of pleading are, in reality, founded in common sense, and are by no means so abstruse as he might be inclined to suppose them. At the same time, that they afford the greatest possible scope for exercising the intellectual faculties; and might, with great advantage, be studied for the mere improvement of the reasoning powers. Indeed, pleading affords the most beautiful illustration of the nature and utility of the art of logic—an art, which has also been greatly and undeservedly decried; but from which the most important advantages may be derived, both in

morals and science (*v*). It would perhaps be a very desirable improvement in the teaching of this art, if the examples to its rules were drawn from pleading; as this method would at once furnish both the practical application, and the proof of its utility. Sir W. Jones, in the prefatory discourse to his translation of the speeches of Isæus, remarks, "that our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analysing a cause; of extracting, like the roots of an equation, the true points in dispute; and referring them, with all imaginable simplicity, to the court or the jury. It is reducible to the strictest rules of pure dialectic; and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed Peripatetic system; which, how ingenious

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(*v*) Lord Coke, in his Commentary on sect. 381 of Littleton, says, "By this argument, logically drawn *a divisione*, it appeareth how necessary it is that our student should (as Littleton did,) come from one of the universities to the studie of the common law, where he may learn the liberall arts, and especially logick; for that teacheth a man, not onely by just argument to conclude the matter in question, but to discern between truth and falsehood, &c. whereby it appeareth how necessary it is for our student." *Co. Litt.* 235, b

and subtle soever, is not so honourable, so laudable, or so profitable, as the science in which Littleton exhorts his sons to employ their courage and care."

SECTION II.

The Analogy of the Rules of Pleading to pure Dialectics.

In order to shew the close connection which exists between the forms of pleading and the rules of logic, we shall endeavour to put the foregoing pleadings into a dialectic form; which will also serve to elucidate the observations we have already made.

The declaration may be resolved into a syllogism, of which the *major premiss* states the rule of law, and the *minor* shews the application of the case to the rule. This syllogism, however, is usually an enthymeme, of which the *major premiss* is suppressed. To take a familiar example, suppose debt on bond; the declaration states—

Min. *That the defendant acknowledges himself, by a certain writing obligatory, bound to pay a certain sum to the plaintiff.*

Therefore, *He ought to pay it.*

Here the *suppressed premiss*, which, for greater convenience, we shall make an hypothetic, is,

Maj. *If a man acknowledges himself, by a writing obligatory, bound to pay a certain sum, he ought to pay it.*

This is the general rule of law, and is *primâ facie* true.

Now let us examine each proposition separately: if the minor be false, the defendant at once pleads the general issue of '*non est factum*,' which is equivalent to '*negatur minor*,' and puts the plaintiff on the proof. If the minor be true, then the error must lie in the suppressed premiss; or the conclusion is badly drawn. But the hypothetic major may be bad in two ways: first, the consequent may not follow from the antecedent at all; or in other words, there may be no such general rule of law; and to this the defendant may demur, which is equivalent to '*negatur major*.' But, secondly, as the antecedent of the hypothetic is indefinite, it may be taken either as universal, or particular; *i. e.* it may be considered as an universal rule, or one admitting of exceptions. If it be taken in the argument as universal, then it may be bad; or in other words, there may be exceptions to the

general rule of law. And on the other hand, if in such case it be taken as particular, then the conclusion is improperly drawn: for it is "*argumentum a particulari ad universale;*" because, the conclusion being in the singular, the subalternans, from which it is deduced, must be universal. In other words, the defendant may shew that the case falls within the exceptions, and not within the rule; and this he must do by special plea, which is equivalent to a '*non sequitur,*' and must be proved by a collateral argument: for it is not enough to shew that there are exceptions to the general rule; but the defendant must prove his case to be one of the exceptions. And, in general, where the conclusion is contingent, it will be taken to be good, until the contrary is proved. Another reason why the defendant is, in this latter instance, bound to prove his case, is, because no man shall be obliged to prove a negative; which the plaintiff would be compelled to do, if it lay upon him to shew that the case did *not* fall within the exceptions.

Let us suppose, then, in the example given, that the defendant pleads '*solvit ad diem.*' We shall now examine his collateral syllogism.

Here the suppressed premiss is—

Maj. *If the condition of the bond has been performed, then the defendant is not liable.*

Min. *The condition has been performed, for the money was paid at the day.*

Therefore, *The defendant is not liable for the penalty.*

The student will observe, that the minor of this syllogism is not a simple proposition; but that the whole argument is in fact a '*sorites*,' though expressed for the sake of brevity in the above form. Here '*negatur major*' is a demurrer to the exception; or that there is no such exception to the general rule of law laid down by the plaintiff. But the minor is resolved into two parts; namely, whether the money has been paid in the manner stated, or at all;—and, secondly, whether such payment is a performance of the condition. The first is put in issue by a *negatur minor;* and the defendant must prove it at the trial: the second point results from the major of the second syllogism, into which the *sorites* is resolved, and is a demurrer in law by a '*negatur major secunda.*'

We might pursue this investigation much higher, but we have purposely selected the sim-

plest example for illustration; and this, it is apprehended, is sufficient to let the student see that the principles of special pleading, and those of pure dialectics, are perfectly similar (*w*). It is obvious, that the illustrations we have adduced, refer only to special pleas in bar. The same logical method is, however, equally applicable to all other pleas. In effect, the declaration does not confine itself to the naked proof of right; but proceeds to shew, by a statement of demand and refusal, that the right is withheld; and therefore the plaintiff calls upon the court for its assistance; or in other words, the sanction of the law. By this concluding part of the declaration, the competency of the jurisdiction, the non-disability of the plaintiff, and the correctness of the form of proceeding, are all inferred; and if the defendant can shew a deficiency in any of these particulars, he may plead the same in abatement. And these propositions, like the former, may be all put in the syllogistic form; and their correctness tried by the same test.

(*w*) "The structure of a record, raised on these foundations, is not less solid than the demonstration of a proposition in Euclid; and pleading, formed on these maxims, is not only matter of *science*, but perhaps affords some of the best specimens of strict genuine logic." *Vide* Wynne's Eunomus, Dial. 2nd.

SECTION III.

Of Pleading in Equity, and its Analogy to Common Law.

We shall now proceed to shew the application of the principles we have laid down, to cases in equity; and although, from the difference in the forms of proceeding in Chancery, it may not appear at first sight, yet upon a closer inspection, we shall find that there is a strict analogy between the pleadings in equity and those at common law.

The original writ, sued out at common law, requires the defendant to repair the injury complained of; or to appear in court, and shew cause to the contrary. The declaration afterwards is but an exposition or amplification of the writ. If the defendant contests the suit, he comes in and pleads, in the manner we have described in the former part of this chapter. Proceedings in *equity* are commenced by a petition to the court, to issue the king's writ of *subpœna*, to compel the defendant to appear, and "answer concerning those things which shall be objected to him; and farther, to do and receive what the said court shall have considered in that behalf;" which is the language of the writ. The petition

must, therefore, state the cause of complaint, as a ground for issuing the *subpœna*. Originally, when the defendant appeared on the *subpœna*, articles in writing were exhibited to him, containing such charges as he was required to answer upon oath; but it was found more convenient to insert such charges in the body of the petition itself, which was thence denominated a *bill* in Chancery. Hence the primary object of a bill is to obtain a discovery upon oath from the defendant; and then to have such relief grounded upon the defendant's admissions, or the complainant's proofs, as the court shall think proper. The bill, therefore, being framed with a view to extract a discovery in the first instance, is generally of considerable amplitude, stating a variety of circumstances by way of inducement; and usually anticipating and controverting the defence of the adverse party. In this respect it differs from the declaration at common law, which is a pure pleading, confined to the single and simple point of charge, or statement of injury; and from this difference, it will be seen, some of the apparent anomalies in pleading in equity arise.

As the bill, in setting out a cause of complaint, must state an injury sustained, or likely to be sustained, it will contain the two propositions

to prove the right formerly noticed (*a*), and will, in substance, admit of the same modes of defence as at common law: whatever dissimilarity exists, is caused by the difference of form. The prayer of the bill is, in the first instance, that the defendant shall be compelled to answer upon oath the several allegations contained in the bill; and thus it performs the office of an *examination*, as well as of *complaint*. Hence arises a species of pleading in equity different from anything we have hitherto seen; namely, the *answer* to the bill; which, in analogy to the bill, has the double character of a pleading and a proof: being a *plea* so far as it denies the allegations of the bill, perfectly analogous to the *general issue* at law: and a *proof*, so far as it contains admissions of any part of the complainant's case. Here, too, many facts, which might have been available as a plea, are allowed to be stated by way of answer; similar to the rule, which permits such facts to be given in evidence, under the general issue at common law. And the reason seems to be, that as the chief end of a plea in equity is to decide a preliminary valid objection, without putting the parties to the expence and trouble of arriving at the same point, by the circuitous mode of following up the

(*a*) *Vide ante*, p. 205.

suit, wherever that object will not be effected by a plea, the party is at liberty to resort to whichever mode of defence he thinks most suitable: for as the reason of the rule ceases, '*cessat et ipsa lex.*' The invariable rule of law is, that every defence which cannot be specially pleaded, may be given in evidence under the general issue; and a similar rule holds in equity: for wherever the party has a defence, which is not the proper subject of a plea, such defence may be stated in the answer (*b*). Thus we find the answer, either, 1st, traverses, and denies the allegations of the bill; or, 2nd, it admits them to be true; or 3rd, it confesses and avoids such points as need not be specially pleaded to: and these are, in fact, the several parts of an answer, as laid down in the books of practice.

Now, as a decree of the court of equity is pronounced on a view, both of the fact and the law of the case, the answer, such as we have described it, might be deemed in all cases a sufficient defence, since it includes the *three last modes* (*c*); and the question of law is determined at the hearing. But we must recollect, that one of the principal objects of special pleading is to save the parties the expence and trouble of prov-

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(*b*) Mitf. 249. 1 Atk. 54. 2 P. Wms 145.

(*c*) *Vide ante*, p. 212

ing, by evidence, facts which might eventually turn out to be immaterial, or inadequate to sustain the right demanded.

From the nature of equity, it is obvious that the *right demanded*, cannot be any definite essential quality, flowing from the relation, but only growing out of it incidentally; and which therefore must be determined '*secundum æquum et bonum*.' This is the proper business of the court at the hearing; and when the rights of all the parties are ascertained, thereupon is grounded such measure of relief, as the reason and justice of the case may require. The party complainant, therefore, after stating the hardship under which he labours, from the nature of the relation existing between him and the defendant, prays the court to grant him such specific relief, as he conceives himself entitled to demand. The relief prayed includes, of course, the restoration of the equitable right, supposed to be withheld; and ancillary to relief, is discovery from the defendant: or the discovery may be the principal point, and the only right demanded. Hence the propositions of a bill may be universally laid down to be—1st, *That from the relation stated, accrues the right to discovery, and such relief as is prayed for.* 2nd, *That the relation stated, is that which actually exists.*

It is evident that this first proposition assumes the sufficiency of the form of the application, as well as the existence of the right; from which it has been doubted whether equity has any pleas in *abatement*, as contradistinguished from pleas in *bar*: but this is a mere question of words, and not worth the enquiry (*d*).

These two propositions admit of any defence which either, 1st, denies the *right*, either to discovery or relief, or both; or, 2d, denies the *relation*; or, 3rd, *invalidates* the relation, or *bars* the right. Most of these may be done by way of answer; but as it may be a principal object with the defendant not to answer at all; and as it will preclude unnecessary litigation to state a valid bar *in limine*, the first mode of defence must, in general, be taken advantage of by demurrer; the third, by plea. To these there is only a formal replication, for the purpose of tendering and joining issue; the necessity for special replications being obviated by the permission, which the parties have, to add to, and amend their pleadings.

(*d*) Merewether *v.* Mellish, 13 Ves. 437. And *vide* Beames' Pleas, 57, 58, 59. The difference between pleas in abatement and those in bar in equity, rests upon precisely the same grounds as at common law

From the principles above stated, it is sufficiently clear, that the two modes of defence just mentioned, are similar to the analogous ones at common law, and are here perfectly applicable; for, in general terms, a *demurrer* is confined to the single point of law; but a *plea* opens the two questions—of law, and of fact; to either of which the opposite party may except. The demurrer, in the first mode of defence in equity, is taken on the complainant's own statement, by his bill; and consequently the facts cannot be disputed. In the third mode, the defendant puts forward a new statement of his own; and this must be by plea, that the complainant may have an opportunity to reply, and so put him to the proof of the new facts.

Hence is the grand distinction which is drawn between demurrers and pleas in the books; that the one is an objection, apparent from matter contained in the bill; the other, from matter '*dehors*,' the bill (*e*). But this latter is rather an accident than the essential difference; as the matter of a plea need not necessarily be *dehors* the bill. Accordingly we find that that species of plea, called a '*negative plea*' (*f*), does not advance any new fact, which the bill had omitted,

(*e*) Beames on Pleas, 2. (*f*) Mitf. 187, 188. Mitf. *Passim*.

but is simply confined to the denial of a point stated in the bill, on which the whole right of action depends. Nor is this peculiar to equity: the plea of '*ne unques executor*,' (*g*) '*ne unques accouple*,' and such like, which are pleas in bar at common law, coming under the *second mode* of defence; and many of the pleas in abatement are strictly of the same nature as the negative plea in equity; and do not advance foreign matter. In like manner, that species of plea, which sets up a defence anticipated by the bill, and therein sought to be controverted, does not bring forward matter *dehors* the bill; and yet the objection cannot be taken advantage of by demurrer; but is, with strict propriety, the subject of a plea; *because it involves a question of fact as well as of law*. Such is the plea of release to a bill, which seeks to set such release aside on the ground of fraud, or want of consideration; or the plea to a bill to set aside a decree on the ground of fraud, and the like. Here the whole question turns on the validity of the bar sought to be impeached; and therefore the plea must go on to deny, by averment, the

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(*g*) The plea of '*ne unques executor*,' is classed by Lord Redesdale, among pleas in abatement; and is treated as such by Mr. Beames, when speaking of *negative pleas*. But it is manifestly a plea in bar, of the *second mode*; namely, the denial of a particular fact, on which the relation rests. See also 1 Saund. 274, a, (n. 3.)

ground of impeachment; which is, in such case, the real point at issue. But this point is a point of fact, and consequently cannot be controverted by demurrer; which is an issue in law only.

But it is necessary that the fraud, or other matter, be denied by *answer* likewise. To seek for the reason of this peculiarity, from the analogy of law, we must go somewhat deeper into the enquiry. In the first place, we must recollect, that an issue is produced by a direct averment on the one side, and a traverse on the other: and that party which first traverses or denies a specific averment, is said to *tender* an issue on that point. Now at law, no issue is tendered by the special plea; but as it always relies upon new facts, it concludes with a verification. And even in the case of a *special* negative plea, there is no issue tendered by such plea; because it is not the denial of a distinct averment in the declaration, but only of a point assumed; and which must be formally averred, before the traverse can tender an issue: and the negative plea, as it alleges no new fact, does not even require the usual verification (*h*). In equity, since the disuse of special replications and rejoinders, there are but two of the pleadings which tender an issue—the answer, on the part of the defendant; and the replication, on

(*h*) Co. Litt. 303, a.

that of the complainant. When the defendant desires to take *issue in law*, he files a demurrer, and the complainant sets it down to be argued; which is a joinder in demurrer: on the other hand, he tenders an issue on the facts by his answer, so far as it traverses or denies them; and the complainant joins issue by the first part of his general replication, which states, that "he will aver, and prove, his said bill to be true, certain, and sufficient in the law, to be answered unto:" and in the latter part, which maintains that "the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant;" he tenders an issue on his part to such portions of the answer as confess and avoid the bill, or to the new facts of the plea; and to this the defendant *pro formâ* rejoins. As, therefore, in conformity to the rule of law, the plea in equity does not tender an issue (*i*), in the case of negative averments being contained in the plea, the same points must also be denied, by way of answer; for otherwise no issue could be joined on such negative averments. The complainant could not tender an issue upon them by his replication; for that would be but the negation of a negation; which, in fact, only amounts to an affirmative; and we have seen, that an issue "consists upon an affir-

(*i*) 2 Bro. C. C. 144.

mative and a negative:" therefore the defendant must produce the issue in the only way which remains to him,—that is, by answer. This difficulty is obviated at common law, by a special replication, which may tender an issue affirmatively to the negative averment.

And here we must mark the distinction between a *negative plea*, which is frequently supported by affirmative averments; and *negative averments*, which are used in support of an affirmative plea. And this distinction will furnish us with another reason for the general rule laid down, *viz.* "that if there is any charge in the bill which is an equitable circumstance in favour of the plaintiff's case against the matter pleaded, as fraud, or notice of title, that charge must be denied by way of answer, as well as by averment in the plea" (*j*). It will be seen at once, that such denials are negative averments, in support of an affirmative plea. Now we have before noticed, that when the complainant intends to dispute the facts of the plea, he replies, and thereby puts the defendant to the proof of his allegations; so that in this instance the defendant would be forced to prove a negative, which is contrary to reason and the rule of law. This absurdity is obviated by the defendant's

(*j*) Mitf. 241. Roche *v.* Morgell, 2 Sch. & Lef. 728.

denying the fraud or notice in his answer; which at once tenders the issue, and puts the complainant on the proof. But, besides the denial by way of answer, there must likewise be positive averments in the plea; and this for two reasons:—first, because, as the plea admits the facts of the bill, without such averment, it would acknowlege the fraud or other ground of impeachment to the bar; and, secondly, by such acknowledgment the plea would be imperfect; as a fraudulent release, for instance, would be no release, and therefore not a good bar.

This mode of pleading has been objected to on the ground of duplicity; a mistake, which has arisen from want of sufficient attention to the distinction between averments in support of a plea, and the pleading a double bar, which alone constitutes duplicity (*k*).

Thus, it is humbly conceived, we have shewn that this kind of plea differs not in principle from other pleas; a disquisition into which we have been led, both because it serves to elucidate the nature of pleas in general, and to point out the correctness of Lord Eldon's observation, "that the best rule is analogy to law." (*l*); but principally, because Mr. Beames, in his

(*k*) 1 Burrowes, 320. (*l*) 9 Ves. 54.

learned Treatise on Pleas, styles this an '*incongruous plea*', and thinks that it is not properly a plea, but something in the nature of one. His opinion upon this subject seems to have been formed from supposing that the essential difference between a demurrer and plea is, that the latter always relies on matter '*dehors*' the bill: whereas the true distinction is, that the demurrer is *an issue in law, on the complainant's own shewing*; the plea is an objection raised by a *new shewing* of the defendant. But the defendant's new shewing may be of *old* matter stated in the bill, (out of which matter a contradictory case may be made by traverse) although most usually it is altogether of *new matter*. And the reason for such new shewing, whether of old or new matter, being the proper subject of a plea, is, that it lets in the *fact* as well as the *law*.

With the view that is here taken of this subject, the old definition of a plea in equity, laid down in the Cursus Cancellariæ (*m*), and adopted by Lord Redesdale, strictly accords, and tends to fortify and prove the correctness of the foregoing reasoning. A plea is there defined to be, "a special answer to a bill, or some part thereof, shewing and relying upon one or more things as a cause why the suit should be either dismissed,

(*m*) Curs. Can. 180.

delayed, or barred" (*n*). And first, it is an answer, because it avers and maintains one or more *facts*, wherein it differs from a demurrer, which rests upon *law* only; and in some instances it denies allegations in the bill by negative averments.

But, secondly, It is a *special* answer, "differing in this from an answer in the common form, as it demands the judgment of the court in the first instance, whether the matter urged by it does not debar the complainant from his title to that answer which the bill requires" (*o*).

Thirdly; "it relies upon one or more things," (not *new* things) "as a cause why the suit should be either dismissed, delayed, or barred." The first part of this member of the definition points out the integral division of a plea into the matter of it, and the averments:—"on one or more things" (*i. e.* facts or averments which may be manifold)—"as a cause" (*i. e.* the matter or bar) which must be single (*p*). The latter part briefly gives the division of a plea into its several kinds.

This will give the student some idea of the

(*n*) Mitf. 178.

(*o*) Roche *v.* Morgell, 2 Sch. & Lef. 721.

(*p*) 1 Burr. 320. Mitford, 238, and the cases there cited.

extreme accuracy of most old legal definitions, which cannot be too attentively studied: and it was the more advantageous to pursue this subject so far, because he might be induced to conclude, from the loose manner in which it has been ordinarily treated, that the system of pleading in equity was not founded on any fixed principles, but left to fluctuate amid variable decisions and arbitrary rules.

CHAPTER II.

OF THE ORIGINAL BILL IN EQUITY.

SECTION I.

Of the general Form and Structure of ordinary Bills.

A BILL in equity, as we have remarked in the preceding chapter, has a two-fold object in view;—first, the statement of complaint, similar to the declaration at common law; and, secondly, the examination of the defendant upon oath. So far as it is a mere pleading, the bill must set out the nature of the relation between the parties, and the particular incidents which create the hardship which is the cause of complaint; and one of these incidents is the want of adequate relief at common law. This is the main body of the bill. Again, so far as the bill acts the part of an *examination*, it must state all such matters of inducement, and such collateral circumstances, as may tend to extract a discovery; or which may raise a presumption of the truth of the principal statement, even if denied by the defendant. Should there be matter of avoidance, of which the defendant might avail

himself, the bill, as an *examination*, should also contain charges to rebut the defence. It has already been observed, that the bill is a petition to the court for a *subpœna*, or such other writ as the exigency of the case may require; and, accordingly, it concludes with a prayer in the usual form of petition, and stating the ends for which this writ is prayed; which are, first, that the defendant may answer the several distinct allegations of the bill, which are for that purpose put in an interrogative form; and, second, that the court may interpose with relief.

This is the sum and substance of every bill which can be filed; and how long and intricate soever it may be drawn, it nevertheless contains but the four following parts.

First, the circumstantial *statement of the relation*, including the inducement or introductory part.

2nd. The incidents which produce the grievance complained of, including the *requests* made to the defendant, and his *refusal*.

3rd. The statement of such collateral circumstances, if necessary, by way of *charge*, as may compel the defendant to acknowlege the grievance, or which may anticipate and controvert his defence.

4th. And lastly, by *reason* of the foregoing complaint, and of the want of adequate remedy at common law, it concludes with a petition for the

subpœna, to the end that the defendant may answer the premises, and the court decree relief.

These four parts are each marked by certain technical language, with which they commence. The *first* part begins thus:—'Humbly complaining, sheweth unto your Lordship, your orator, A. B. of , that, &c.' and then proceeds at once to the statement. Here we must stop to observe, that this commencement of the bill is framed to express its office, both as a *petition* and *complaint*. The words are "humbly *complaining*, sheweth;" and it styles the complainant, not your petitioner, but your *orator*, to mark the distinction between a bill and a mere petition, and to designate the higher character which he sustains. The word 'orator' is used in allusion to the formal conclusion of all petitions, "and your petitioner will ever *pray*" (*a*); a custom which took its origin from the piety of our ancestors; and the authority of ecclesiastics in those primitive days, when the seals were always entrusted to churchmen, who were likewise the keepers of the king's conscience (*b*). Another point to be observed in the

(*a*) In Ireland the form used is, "your suppliant and *daily* orator,"—*i. e.* "who remembers you daily in his prayers."

(*b*) 3 Black. Com. 48—54. Madox Hist. Exch. 42.

formal commencement of the bill is, the grammatical inversion; a more remarkable instance of which, however, occurs in the last part of the bill, which we shall notice presently.

The *second* part commences, 'And your orator hath frequently and in a friendly manner applied to and requested'—[the defendant to do such acts, according to the nature of the bill, as equity and good conscience required of him] 'And your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been; but now so it is, &c.' [*i. e.* the defendant *confederating with others* to oppress and defraud the complainant, refuses to do what is just.] As this part is nearly the same in all bills, it has become a common form. If the circumstances creating the hardship be only such as the court can rectify or controul, and not depending on the acts of the defendant; as where trustees desire to act under the direction of the court, and the like; then the above common forms are omitted, and the difficulty laboured under is here stated according to the nature of the case.

The *third* part is generally introduced by a statement, that the defendant makes various pretences to justify his refusal, the contrary of

which the complainant *charges* to be true; and then proceeds to make such other charges as either corroborate his own statement, or controvert the defence likely to be adopted by the adversary. 'And to countenance such his unjust conduct, the said defendant sometimes pretends that' [there is some good matter of excuse to discharge him from liability] 'whereas your orator charges the contrary to be true, and that' [there are such other circumstances in the case as invalidate the excuse, or corroborate the statement]; 'and at other times he pretends' [other pretences], 'whereas your orator charges the contrary to be true, and' [other charges]. And the whole concludes with the averment, 'all which actings, pretences, and refusals of the said *confederates*' (alluding to the charge of confederacy, in the second part) 'are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.'

The *fourth* part is, the petition to the court for the *subpœna*; and begins by formally setting out the *reasons* for applying to the court, *viz.*—'In consideration whereof' (*i. e.* of 'the wrong and injury' complained of,) 'and forasmuch as your orator is without remedy at common law, and cannot have adequate relief but in a court of equity;'—May it please your Lord-

ship to grant his Majesty's most gracious writ of *subpœna*, &c. commanding the defendant to appear; *to the end* that he may distinctly answer upon oath whether each particular fact and charge in the bill is not as therein stated, or how otherwise; and that he may be decreed by the court to perform such acts as the court in its wisdom shall think proper, and the justice of the case may require.—'And your orator shall ever pray,' &c. The whole of this part, beginning with the words 'in consideration whereof" to the conclusion of the bill, is but a single sentence. There is, however, a considerable inversion in its form: the clause commencing "to the end," being put before the prayer for the *subpœna* "may it please," &c. The want of sufficient attention to this point, coupled with the circumstance of the extreme length of the sentence, the whole statement and charge of the bill being here repeated in the form of interrogation, and the prayer for particular relief being also included, has occasioned great perplexity in the mind of many a pupil; and in not a few instances, has prevented him from ever arriving at the knowlege of the true bearing and connection of the several members of this complicated sentence. Nor is the pupil much assisted in this difficulty, by the usual division of a bill into *nine* parts; than which nothing can be more illogical and incorrect. According to this ar-

rangement, to be met with in all the books, the several parts of a bill are, 1st, the direction or address. 2. The Parties. 3. The plaintiff's case. 4. The charge of confederacy. 5. The pretence and charge. 6. That part which gives jurisdiction to the court. 7. The interrogating part. 8. The prayer. 9. The usual prayer for a *subpœna* or other process. The four last are included in the single sentence to which we have just called the student's attention, and which are thus presented to his mind as so many distinct and unconnected parts; and his embarrassment is increased by finding, that in the precedents to be found in the books, these several parts are marked as distinct periods.

In order to illustrate the foregoing observations, we shall insert here the skeleton of a bill.—

To the Rt. Hon. the Earl of
Eldon, Lord High Chancellor of Great Britain.

[1.] Humbly complaining, sheweth unto your Lordship, your orator, A. B. of , gent. that [at a particular time mentioned, certain events took place which led to the relation now existing between your orator, and C. D. the defendant, hereinafter named]. And your orator further sheweth unto your Lordship that [your

orator and the said defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant; whence arise certain duties to be performed by the said defendant, C. D.] [II.] And your orator hath accordingly, both by himself and his agents, applied to and requested the said C. D. to [perform the said duties], and your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your Lordship, the said C. D., combining and confederating with divers persons at present unknown to your orator, (but whose names, when discovered, your orator prays he may be at liberty to insert in this his bill, with apt and proper words to charge them as parties, defendants hereto) and contriving how to injure and oppress your orator in the premises, absolutely refuses to comply with your orator's aforesaid reasonable requests. [III]. And to countenance such his unjust conduct, he sometimes pretends [some matter of excuse to discharge him from liability]; whereas your orator charges the contrary to be true, and that [there are other circumstances which invalidate the excuse of the said defendant, and corroborate your orator's statement]; All which actings, pretences and refusals of the said confederates, are contrary to equity and good con-

science, and tend to the manifest wrong and injury of your orator in the premises. [IV.] In consideration whereof, and forasmuch as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable: to the end that the said C. D. and his confederates, when discovered, may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and distinct answers make to all and singular the matters aforesaid; and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively, distinctly interrogated; and more especially that the said C. D. may, in manner aforesaid, answer and set forth, whether [at the time hereinbefore in that behalf mentioned, or at some, and what other time, certain events did not take place, which led to the relation now existing between your orator and the said defendant, or how otherwise; and whether such relation does not in fact exist; and whether your orator and the said defendant are not parties to such relation, under circumstances to which particular equitable, or some and what incidents are concomitant, or how otherwise; and whether such duties as are

hereinbefore set forth to be performed by the said defendant, did not arise therefrom, or how otherwise]; and whether your orator hath not, by himself or his agents, or how otherwise, made such applications and requests as are hereinbefore in that behalf mentioned, or some such or the like; or any and what other applications and requests, in respect of the several matters aforesaid; and whether the said defendant hath not refused to comply therewith, and why; and whether [such circumstances as are hereinbefore charged, for the purpose of invalidating the excuse of the said defendant, and corroborating your orator's statement, are not true, or how otherwise]; and that the said defendant may be compelled, by and under the decree and direction of this honourable court, [to perform such duties as are incident to the relation hereinbefore stated to exist between him and your orator;] and that your orator may have such further and other relief in the premises, as to your Lordship shall seem meet, and the nature and justice of the case may require. May it please, &c.

[*Counsel's name.*]

Pray Spa.

v.

C. D.

The above is the general form of every kind of bill, as prepared in the draftman's office; and with this outline before him, the pupil will be

able to shape his course without any difficulty, in all cases; and to judge what parts are essential, and what may be omitted, according to the nature of the subject. We shall presently advert to this point more at large.

The pupil will observe, that in the precedent of the draft, the conclusion being a common and invariable form of prayer for the *subpœna*, is marked by an '*&c.*' with a marginal direction to the solicitor; who is to have it engrossed at full length, as to the names of the parties against whom he is to pray process; for none are defendants to the suit, although mentioned in the body of the bill, unless process of *subpœna* be issued against them (*c*). The conclusion of the bill, as engrossed, is as follows:—"May it please your Lordship, to grant unto your orator his Majesty's most gracious writ of *subpœna*, to be directed to the said C. D., and to the confederates when discovered, thereby commanding them, and every of them, at a certain day, and *under a pain* to be therein limited, personally to be and appear before your Lordship, in this honourable court; and then and there, full, true, direct, and perfect answer make, to all and singular the premises; *and further to stand to, perform, and abide such further order, direction, and decree*

(c) 2 Dick. 707.

therein, as to your Lordship shall seem meet (*d*): and your orator shall ever pray," &c. If the bill seeks for an *injunction*, or a '*ne exeat regno*,' such writ is also prayed for in the conclusion, in addition to the writ of *subpœna*; for the form of which the student may consult the books of precedents; the above being sufficient for our purpose. In a *certiorari* bill, the only object being to remove the proceedings from the court below, the prayer for a *subpœna* is unnecessary, as the parties must follow the suit (*e*).

Where the Attorney-General is a defendant, instead of a *subpœna*, the bill prays, "that his Majesty's said Attorney-General, being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to, and abide," &c. (*f*): and in the case of a Peer, a letter missive is prayed, "to be directed to the said [Peer,] desiring him to appear to, and answer your orator's said bill; or in default thereof, his Majesty's most gracious writ of *subpœna*," &c.

(*d*) If the bill be for discovery merely, the words in italics are omitted. *Vide* 3 Atk. 439.

(*e*) Mitf. 40. Wy. Prac. Reg. 82.

(*f*) The Attorney-General may refuse to answer, and no process of contempt can go against him. 1 Dick. 730. Davine *v.* Atty.-Gen. Exchequer, 1813

SECTION II.

Of the First Part of a Bill; and herein of the Doctrine of Relations.

Having given this general view of the nature and form of a bill, we shall now draw the student's attention to its several parts, and add a few particular observations on each. In the appendix of common forms, will be found the different modes of address used in the several courts of equity; and also the formal words of commencement, according to the various capacities of the parties instituting the suit.

The additions, and places of abode of the complainants, should be specifically stated, both to prevent suits from being commenced in the names of fictitious persons, and also that the defendants may know where to resort for redress, in case the proceedings should be deemed vexatious; the practice of taking security for that purpose having been long since disused, except where the complainant *resides* out of the jurisdiction, when security for costs, to the amount of 40*l.* will be required, on the defendant's motion (*g*). In the Exchequer, in order to give the

(*g*) Mos. 7. 11 Ves. 598. If the plaintiff describes him-

court jurisdiction, the complainant states himself to be a debtor, and accountant to his Majesty, which is similar to the practice at common law; and this is an averment not allowed to be traversed, and therefore mere form. A bill filed by a Peer, always commences without affixing the epithet humbly; but simply—"complaining, sheweth unto your Lordship."—The form for infants, married women, and lunatics, will be seen in the Appendix.

When the Attorney-General commences a suit, either on behalf of the crown, or those under its protection, whether with or without a *relator* not personally interested, he proceeds by way of *information*; which differs in no respect from the form of a bill, except that it does not use the language either of complaint or petition; but merely, "informing, sheweth unto your Lordship, Sir A. B. knight, his Majesty's Attorney-General, on behalf," &c. If the *relator* be also a complainant, then the proceeding will be both information and bill; for the form of which, as also of informations in general, see the Appendix.

The two first parts, according to our division,

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self in his bill of a place where he cannot be found, he must give security. 2 Fowl. Exch. Prac. 370.

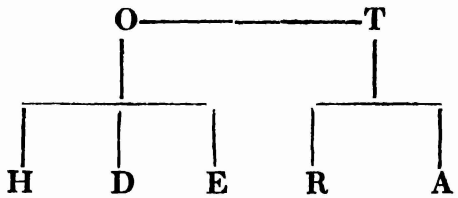
are essential to every kind of bill whatever; as the first states the circumstances of the case, or the relative situation of the parties; and the second sets out the injury sustained, or the grievance likely to ensue, not remediable at common law, which is the ground of application for the interference of a court of equity. So far, the bill acts the part of a pleading, similar to the declaration at common law; and according with this view of it, is the definition given in the *Cursus Cancellariæ*; where it is said, "a bill in equity is in nature of a declaration at common law; wherein the complainant is to set forth the circumstances of his case for some fraud, force, or injury done to him, praying relief of the court, for that he has no remedy by the common law: and also process of *subpœna* against the defendant, to compel him to answer the charge of the bill (*h*)." The observations we have made, therefore, in the foregoing chapter, relative to the mode of statement of injury, are entirely applicable to this part of a bill. We there shewed that the plaintiff, in complaining of a wrong done to him, does nothing more than set forth a right, of which he has been deprived: that rights are incident to relations; and that therefore to prove a right, the *relation* in which

(*h*) Curs. Can. 36.

it is founded, must be thoroughly understood. Relations, again, we have seen, let in three separate considerations:—1st, the *parties*, with their several disabilities and liabilities in law; 2nd, the subject matter, or *contract*, with the circumstances under which it was made; and herein also of the nature of the property in litigation; and *lastly*, the legal and equitable incidents or *rights*, the withholding of any of which, is the cause of complaint (*i*). We shall here subjoin such additional instructions, with regard to the doctrine of relations, as may be generally useful to the pupil.

Relations may be divided into *primary or original,—secondary or derivative,*—and *collateral.* The first are those which subsist between the original parties; the second are such as are derived therefrom, either by the transmission of interest, or the transfer of title or liability. Thus there is a primary relation between the mortgagor and mortgagee; but if the mortgagor assigns his equity of redemption, there then arises a new, or secondary relation, between the mortgagee and the assignee of the equity. A collateral relation, is that which exists between two or more derivative parties.

(i) *Vide ante*, p 203—4.



Thus, in the figure above, let O and T stand for the parties to the original relation; let T be tenant for life, and R a remainder-man; let A be an assignee, or alienee of T's interest,; let H represent the heir-at-law to O; D be his devisee, and E executor. Here there will be a secondary relation between O and A, in respect of *the privity of contract* between T and A. There will be also a secondary relation between O and R, in respect of the *privity of estate* between T and R. Between T and H there will be a secondary relation, in respect of the *privity of blood* between O and H. So between T and D, in respect of the *privity of interest* between O and D; and in like manner between T and E, on account of the *privity of representation* between O and E. Again, H, D, and E on one side, and A and R on the other, stand in collateral relations to each other. Other derivative relations might be enumerated; but this will suffice at present for the purpose of illustration. The right understanding of these particulars is in the first place essential to the determination of the

necessary parties to the suit: and the importance of this doctrine will be still further apparent, when we come to treat of Supplemental Bills, and Bills of Revivor.

The *original* relation may arise, either, 1st, out of a specific contract, the incidents of which must depend upon the terms of agreement; as in those cases where a *specific performance* is sought to be enforced: or, 2nd, the relation may be such as, though arising from contract between the parties, is nevertheless recognized and ascertained by the law, which attaches to it certain essential incidents and ingredients,—such as the relation of partnership, of mortgagor and mortgagee, and the like: or, 3rd, it may be produced by the act of a third person, as in the relation of executor and legatee: or, 4th, it may arise by the operation of law; as, for example, the relation between tenant in dower, and heir at law.

In the *first* instance, as the nature of the relation is to be collected from the words of the contract, if the agreement be in writing, it must in general be set out *verbatim* in the bill: if not in writing, then such collateral circumstances must be stated as raise a strong presumption in favour of its existence. On this point, of the specific performance of parol agreements, va-

rious rules have been laid down in equity, with which the student should make himself acquainted, in order to frame his bill in cases of this nature. In the statement of specific contracts, the agreement must also be shewn to be of such a kind as not to militate with general policy (*k*); and that the stipulations contained in it, are such as a court of equity ought in conscience to enforce (*l*). The circumstances, under which the agreement was made, form therefore, in most instances, a material part of the statement; and every fact should be set out, by way of inducement, tending to shew that the consideration was valid, and the terms fair and equitable; for it is a maxim, 'that he that would have equity, should do equity (*m*).'

In the *second* case above noticed, where the relation is one recognized by law, all the legal requisites to form such relation, and the liabilities resulting from it, should be well understood, that the draftsman may be able to bring the case in the bill within the meaning of the law, and shew such a breach as constitutes an injury cognizable in equity. As this kind of relation is founded in like manner as the former, on the contract of the parties, it will be subject to the

(*k*) 9 Ves. 608. 1 Vern. 5

(*l*) 2 Anst 543

(*m*) Curs Can 10. Hardr 97

same rules, with regard to the equity of the consideration and origin.

The same observations will apply to the 3rd and 4th classes above enumerated; with this additional remark—that all the circumstances that led to the existing relation, must be succinctly alleged by way of preamble, both for the advantage of clearness of statement, and also in order to deduce the complainant's *title*.

This last is essential to every bill; and in general, it is to be remarked, there are four things indispensably requisite to be shewn, in the stating part of a bill; namely, 1st, the complainant's interest (*n*) in the thing demanded; 2nd, his title (*o*) to sue; 3rd, the defendant's interest (*p*); and 4th, his liability (*q*): for though there cannot be a title, or a liability, without an interest, there may be an interest without either. Thus, an executor, before he has proved the will, has an interest in the testator's chattels; but not such as to give him a title to sue (*r*): so also an assignee has an interest in the thing

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(*n*) 2 Atk. 210.

(*o*) 1 Vern. 105. 3 P. Wms. 371.

(*p*) 2 Eq. Ca. Ab. 78. 2 Vern. 380.

(*q*) 1 Vern. 180. 1 Ves. 56

(*r*) 1 P. Wms. 172, 766.

assigned, although not liable to be sued for breach of covenant, unless such covenant runs with the land (*s*). We do not here speak of the title or liability, with reference to those defects which are the proper subject of *abatement;* but the title and liability, as derived from the very relation itself, and which therefore must appear on the face of it, if the relation be adequately stated: which title Lord Coke defines to be '*justa causa possidendi quod nostrum est.*' And he says, '*dicitur titulus a tuendo;*' because by it a man holds and *defends* his right (*t*). It is necessary, however, to observe, that the title thus deduced, must not appear by the bill to be affected by any personal disability; and the defendant must be liable in the court of equity where the suit is instituted.

In deducing the title in the *third* class of original relations, it will be seen that such a preamble is necessary, as will shew that the person creating the relation had the power to do so, whether by *law*, or by express *power* in a deed. In the first case the capacity in law is all that need be stated; as for example,—'that the testator was, at the time of making his will, and at his death, *seised* of or entitled

(*s*) 1 Ves. 56.

(*t*) *Vide* Co. Litt, 345, b.

to *freehold estate*, and *possessed* of personal property; and being of sound and disposing mind, made and published his will, with the usual formalities.' With regard to the execution of a *power* created by deed, it will in general be requisite to set out the power in *hæc verba*; since a question may turn on its extent or validity; and if the latter be likely to be contested, the preamble should go back to the origin of the instrument containing the power. Indeed, the student will observe, that the preamble must, in a great measure, depend upon his discretion; always making it consistent with clearness of explanation, and such as may assist the complainant's title, by discovery from the defendant, if any ambiguity in the title render such detail necessary; but upon the face of the statement, at least a *primâ facie* title must appear. In like manner, the draftsman must use his discretion as to whether the whole or any part of the instrument creating the relation, be set out *totidem verbis*; having this general rule to guide him—that it is usually unnecessary, and therefore improper, to state more than the substance, unless where the duty claimed depends upon the very words of the instrument.

With respect to relations arising by operation of law, we need only observe that the progress of the operation should be traced, from the

prior relation to its subsequent effect, and the circumstances must be shewn to be such as that the legal results necessarily ensue.

From the foregoing remarks, the student must feel conscious how necessary it is to have a clear and just conception of the nature of the relation which is to be the subject of his statement, with all its legal and equitable incidents, before he sits down to draw the bill. For, as the nature of the injury must be derived from the incidents of the relation, so the form of the statement must depend upon the nature of the injury: if it be the deprivation of a right issuing out of the express contract of the parties, the terms of the contract will be essential; if, on the other hand, the right demanded is one given by law, the statement, to be adequate, must bring the case within the relation affected by the legal or equitable incidents.

SECTION III.

Of the Second Part, or Statement of Injury.

The point next to be considered, is, what circumstance in the case it is which produces the injury, or causes the hardship against which the complainant seeks relief; and this must arise

from the state of the relation between the parties; either, where a duty flowing from it is withheld, which, though binding in conscience, yet the ordinary courts have not power to enforce: or where the relative situation of the parties is such, whether from fraud or accident, or any other cause, as that a manifest wrong, or even probable injustice or inconvenience would ensue, but for the interference and assistance of a court of equity in compelling a discovery, and supplying the adequate remedy.

This statement of grievance forms the second part of the bill, according to our division; corresponding to the breach in the declaration at common law; and should be made with brevity and succinctness. When the injury sought to be redressed is occasioned by the subtraction of a duty on the part of the defendant, this part of the bill merely contains a statement of *request and refusal, viz.* that various applications were made to the defendant, requesting him to do justice to the complainant, and restore to him the right demanded, or perform the duty withheld, which nevertheless he has refused to do. The refusal is most commonly ushered in by the formal charge of confederacy, which, though usually inserted, is altogether unnecessary (*a*), as new parties may

(*a*) 1 Anstr. 82.

be added at any period of the suit, without any such charge in the bill; and, therefore, in amicable suits, the refusal is stated without charging combination; and this form is invariably omitted where the defendant is a Peer of the realm (*b*).

In those cases, on the other hand, where the grievance arises out of the peculiar situation of the parties, the complainant having explained by his statement their relative position, goes on in this part of his bill briefly to shew the nature of the difficulty resulting from it, or the hardship likely to ensue unless a court of equity interposes to his relief. 'To the end, therefore,' &c. Here, then, the student will observe, as no refusal is stated, of course the introductory charge of confederacy has no place; and in like manner, as the necessity for the interference of a court of equity is embodied in the very statement of grievance, the formal clause of equity, as it is called, commencing—'And forasmuch as your orator is without remedy in the premises,' is also omitted. In the statement of the injury for which redress is sought, it is obvious that the draftsman must be previously acquainted with the extent of the jurisdiction of the court; and to this point the student should

(*b*) Mitf. 33.

turn his particular attention, in order that he may be able to set forth such a grievance in his bill, as a court of equity will take cognizance of: for the mere averment that there is no remedy but in equity, will not avail, unless it appear also on the face of the statement, that the case is such as that the Court of Chancery can compel a discovery, or decree relief.

SECTION IV.

Of the Third Part; or Pretences and Charges.

We next come to the pretences and charges; the nature and utility of which have been already pointed out. As the two former parts belong to a bill, *as a pleading*, in common with the declaration at law; so this *third* part has a peculiar reference to its character as an *examination*. One of the principal advantages attendant upon the mode of proceeding in Chancery, is, that the complainant is entitled to have an answer upon oath from the defendant, as to all the facts stated in the bill; but as it is a maxim in our law, that no man shall be bound to criminate himself, care must be taken that no allegation be made which would subject the defendant, if admitted by him, to a penalty or forfeit-

ure (*a*); unless, indeed, the forfeiture be one thereby accruing to the complainant himself, and that he specifically waives his right to it (*b*), for the sake of the discovery. So far then as the defendant admits the facts alleged in the bill, it precludes the necessity of having them proved in evidence; as, on the other hand, if there be an unequivocal denial on the part of the defendant, two witnesses, at least, are required to establish the fact against his oath (*c*). One of the chief objects of the draftsman's care, therefore, should be to charge in his bill, all such material circumstances of the case as may tend to draw forth from the defendant an admission of the principal matters, and so avoid the necessity of proving them by depositions (*d*).

(*a*) 1 Bro. C. C. 98. 1 Atk. 529. 2 Atk. 392. 2 Ves. 109.

(*b*) 1 Vern. 109—129. 1 Chan. Rep. 144.

(*c*) 2 Chan. Ca. 8. 1 Vern. 161. 3 Atk. 649. 270.

(*d*) It is the usual practice in Ireland, to call upon the defendant to admit the authenticity of such deeds or other writings as are mentioned in the body of the bill, and which for that purpose are produced to him at the time of taking his answer. This appears to be both convenient and correct, upon the principle above stated, as it saves the necessity of having them proved as *exhibits*, by witnesses. The clause in the bill to this effect is introduced immediately preceding the prayer, of which the following is a general form:—'And that the said defendant may view in the hands of your orator's clerk in court, or commissioners (according to his mode of answering)

This, then, is the peculiar province of the charging part of the bill; for if the same were attempted to be done in the statement, it would interrupt its course, and render that confused, the chief quality of which should be clearness and intelligibility. But this, though the principal, is not the only end of the charging part; for as the relief sought frequently consists of a variety of particulars; the charges are sometimes made to support a part of the prayer. Thus, the circumstances which warrant the application for an injunction, are generally stated in the charging part. Again, if it be anticipated that the defendant has any matter of avoidance to set up against the statement of complaint, whatever will operate to rebut that avoidance should be stated by way of charge, founded upon the supposed reasons of the defendant for *refusing* to accede to the complainant's reasonable requests (*e*); and in this respect the charging part supersedes the use of a special replication, and, as far as regards discovery, is somewhat similar to a cross-examination.

Hence we may collect, that the difference

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the aforesaid writings, which should for that purpose be exhibited to him, and set forth, of whose hand writing the same, or any and which of them, as he believes, are: And that,' &c.

(*e*) Mitf. 34—5.

between the stating and charging parts of the bill, is, that the first is confined to simply unfolding the nature of the relation clearly and concisely, containing such matters of inducement as are requisite for explanation and for deducing the title; the latter is used for the purpose of adding all such further facts and allegations, which cannot be conveniently inserted in the statement, and which yet are material, either to extract *admissions* from the defendant, or to obtain *collateral relief:* or, lastly, to *anticipate* the defence. In fact, it being a question of arrangement only, much must be left to the sagacity and discretion of the draftsman, in determining which part of the bill he shall choose for making any particular statement; since the pretences and charges are made a separate part of the bill, more for the sake of the '*lucidus ordo*', than from any real distinction existing, other than that we have noticed above (*f*). In many cases, therefore, this part may be altogether passed over; and the foregoing observations will serve to instruct the pupil, when charges should be introduced and when they may be omitted.

(*f*) Lord Kenyon, in the bills he drew when at the bar, never put in the *charging* part, which does little more than unfold and enlarge the statement. Madd. Prac. 169, and Partridge v. Haycraft 11 Ves. 574, there cited

SECTION V.

Of the Fourth, or Interrogating Part, and Prayer.

Of the conclusion, (which, as we have elsewhere remarked, is but a single sentence) the ground-work is the prayer for a *subpœna*, adding a statement of the *purposes* for which the writ is required. *These* are in ordinary bills:—first, that the defendant may be compelled to attend, in order to *answer* distinctly the several points of the bill; and, 2nd, that upon a view of the case, the court may interpose its authority to prevent, or redress, immediate wrong; or that it may *decide* upon the ultimate claims of the parties, and enforce its decree by process of execution.

By the words of the bill, the defendant is required to give "full, true, perfect, and distinct answers, upon oath, to all and singular the matters stated and charged in the bill, as if he were distinctly interrogated to each;" and this he must do, whether there be interrogatories or not. At first view, therefore, the repetition of the whole bill, by way of interrogation, would appear a very useless prolixity. But experience has proved the utility of this practice, beyond cavil: for the contrary method would not fail

to produce still greater expence and delay to the parties, by occasioning frequent and numerous exceptions and amendments. The statement must, of necessity, be direct and positive; and if the defendant thought it his interest to do so, he might content himself with answering it, according to the letter. But in most instances, such a mode of answering would be perfectly evasive, and leave the substance of the charge quite untouched (*a*). Thus, for instance, if the defendant were charged with having received a specific sum of money at a particular time: although he may have actually received the money, yet he might, with strict truth, deny his having received the *precise* sum, or at the *time*, or in the *manner* specified. The possibility of evasion is, however, obviated, by putting the statement into the form of an interrogatory, with all the concomitant alternatives;—as, 'whether the defendant did not receive that particular sum, or some, and what, other sum of money, at the particular time mentioned, or at some, and what, other time, and in the manner specified, or how otherwise.'

The great object of the interrogating part of a bill is, therefore, to preclude evasiveness in the answer; and the whole attention of the

(*a*) Mitf. 36.

draftsman must be turned to this single point, of putting the question in every variety of form, to elicit a full and definite reply, and to prevent the defendant's having any loop-hole to escape upon a *negative pregnant*. In fact, this part of the bill is altogether subservient to the office which the bill performs, of an examination; and should therefore omit nothing essential to the proof and elucidation of the statement; but, as the substance of the bill is, in fact, the thing to be answered, and the interrogatories are only permitted for the sake of convenience; no question can be put which is not immediately dependant on, or relevant to, a particular statement or charge in the bill (*b*).

With the foregoing reservation, however, whatever may be important to the complainant as matter of discovery to support his case, without his being compelled to resort to extraneous evidence, may and ought to be interrogated to; since one of the principal ends of a bill, taken as an examination, is to supersede the necessity of proof. Thus, in a bill for an account, the nature, value, and amount of the property charged to have come into the defendant's hand, may be enquired into; and how every part has been

(*b*) Mitf. 35—6. 4 Bro. 11 Ves. 273. C. C. 458. 6 Ves. 62—3.

disposed of; and if any remains in the defendant's hands, how it is employed; and every other circumstance which may be of service in taking the account required (c).

This is, however, only subsidiary to the decree; and, therefore, the bill goes on to state, as the *second purpose* for which the writ is prayed, that the defendant may be compelled to account under the decree of the court, in nearly the same words. We have thought it right to make this remark here; because it is apt to appear strange to the pupil, that in one sentence, the defendant is called upon to account with the complainant; and in the next, almost the same terms are used, that an account may be taken under the direction of the court. But the foregoing observations will have explained, that there are two purposes, or *ends*, for which the writ of *subpœna* is required: 1st. for discovery; and, 2nd. for the interference of the court, expressed by its order or decree: and that each of these are distinct.

We now come to the latter *purpose*; the statement of which is usually, though improperly, called the '*Prayer for relief*.' On examin-

(c) 10 Ves. 290. 11 Ves. 301.

ing the structure of a bill, the student will see that the only prayer contained in it is that for the *subpœna*; and that the clause of which we are now treating is inserted in order to shew to the court how far, and in what respect, its assistance is required. This is essential, in order to point out to the court and opposite party the definite objects for which the bill is filed, that the former may know distinctly what it is it is called upon to decide, and the latter what to defend.

At common law, the settled forms of action render this part unnecessary in the declaration, as every case has its express remedy provided; but it is otherwise in equity, where the mode and degree of relief cannot, from the nature of the thing, be bounded or prescribed by any determinate rules, but must be adjusted to the circumstances of every individual case '*secundum æquum et bonum.*' In the former instance, the premises allowed, the law draws the inevitable conclusion; in the latter, the inference is deduced from reason and conscience. It is therefore proper that the complainant in his bill shall not leave this inference to be vaguely collected from a diffuse, and sometimes indeterminate, statement; but that the party who is aggrieved should himself set forth the nature of the redress

which he seeks; and it is sometimes material, even as a medium of construction, for explaining equivocal charges in the body of the bill (*d*).

The relief sought, again, subdivides itself into two kinds — 1st. the collateral and auxiliary assistance of the court for the redress of immediate, and prevention of threatened, injury pending a course of litigation, or the avoiding a probable future grievance; such as an injunction; a '*ne exeat regno*'; a commission to examine witnesses who are abroad, in aid of a trial at law; and the examination of witnesses '*in perpetuam rei memoriam*'. The second species of relief is that which is properly so called, and is founded upon the *decree* of the court, pronounced upon hearing and deciding on the ultimate claims of the respective parties.

A bill may be framed for all or any of these purposes conjointly, as for an answer and injunction, or an answer, injunction, and decree; only it is to be obverved, that such original bills as call for the decree of the court, are alone termed *Bills for Relief*. In many instances, a complainant is entitled to a discovery, and even to the collateral aid of the court by injunction, or an order for a commission, &c. where the

(*d*) 18 Ves. 80.

court could not *decree* relief; and in such case, care must be taken not to frame the bill as a *bill for relief*, for otherwise it would be demurrable (*e*). Hence the student must be acquainted with the nature and extent of the authority of a court of equity, as well as with the subjects of its jurisdiction; that from the one he may learn what injuries the court can redress; from the other, the manner of effecting it. Upon this, and the nature of the injury sustained, or the grievance complained of, must depend the form of the remedy to be applied. If it be an injury arising from the subtraction of a duty, the direct and substantial relief will be a decree for the restoration of the right (wherever that can be effected) accompanied by such ancillary directions as will tend to effectuate that object. If the assistance of the court be required to redress a grievance, or remove a difficulty flowing out of the relative situation of the parties; then such relief must be sought as accords with the practice of the court, ascertained by a series of decisions in similar or analogous cases.

After the statement of the particular relief sought, there is always added a general suggestion, that the complainant 'may have such fur-

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(*e*) 2 Bro. C. C. 619. 2 Ves. and Beames, 328. 6 Ves. 62. 11 Ves. 509.

ther or other relief in the premises, as the nature and circumstances of the case may require;'—and the court, acting upon this suggestion, will vary the relief according to its discretion, so as to meet the justice of the case (*f*); *provided* such relief be not *incompatible* with that sought by the bill (*g*): and the reason of this last rule is, that, as the relief required must grow out of the statement of the injury sustained, of the nature of which, therefore, it will be a fair construction; it would be absurd as well as unjust towards the defendant, to make a decree in favour of the complainant, inconsistent with his own case. But there is an exception to this rule, in the case of an information by the Attorney General, suing on behalf of a charity (*h*), or where a bill is filed by an infant (*i*): in the former instance, because the interests of the charity ought not to suffer from the neglect or default of a public officer; in the latter, because an infant, having no discretion of his own, the court is bound to protect his rights, without any regard to mistake or error in point of form. The draftsman should therefore use the utmost caution in this part of the bill; and

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(*f*) 2 Ves. jun. 401. 5 Ves. 495.

(*g*) 2 Atk. 141. 1 Ves. jun. 426. 3 Ves. 416. 12 Ves. 48. 13 Ves. 114.

(*h*) 1 Atk 355. 2 Ves. 426. 11 Ves. 247. 367.

(*i*) 1 Atk. 6.

if he doubts the complainant's title to the relief he wishes to pray, the bill may be framed with a double aspect; that if the court determines against him in one view of the case, it may yet afford him assistance in another (*k*).

(*k*) Mitf. 31. 2 Atk. 325. 6 Ves. 52.

CHAPTER III.

OF SECONDARY BILLS.

HAVING thus gone through the several parts of an ordinary bill, it only remains to notice some peculiarities in the structure of such bills as are not original, but which are the consequence of, or have some reference to, a former bill: and the peculiarities we shall point out in each, will at the same time be illustrative of the general doctrine.

In the progress of a suit, circumstances may arise which will cause such a change in the state of the relation between the parties, as to render it necessary to add new incidents to the former relation, or to state an entirely new relation, which will, however, have a *reference* to the former, insomuch as it grows out of the former subject of litigation. The same may likewise occur after the termination of a suit, and before the execution of the decree. In any of these cases a new bill must be filed, which, as it of course *refers* to the former bill, and the subsequent proceedings thereon, is therefore dis-

tinguished from the original bill, and termed '*not original.*' So far as such bill merely adds new incidents to a still subsisting relation, it is *supplemental;* where it states a new relation between new parties, it is either *a revivor, or in the nature of revivor, or supplement.*

We have already seen (*a*), that the use of a Supplemental Bill is either, 1st, to supply the place of amendment, at that state of the proceedings when amendment will not be permitted; or, 2nd, to *add* such circumstances which have occurred subsequent to the filing of the original bill, as may either have caused a change in the terms of the relation subsisting between the *original* parties, and consequently in the rights and duties flowing from it; or an alteration in the parties, by means of which new parties to the suit must be brought before the court. From this circumstance of the alteration of the *parties* to the relation, the principal difficulty arises as to when a suit becomes *abated,* and when merely *defective;* and consequently, in what cases a supplemental bill will suffice. We shall here, therefore, endeavour to apply the principles we before laid down concerning relations, as an attempt at a solution of the present difficulty.

(*a*) *Vide ante,* P. 1, cap. 16.

SECTION I.

Of Abatement; and the Distinction between Suits abated, and those become merely defective.

All persons who have such an interest in the matters in litigation, as that their rights may be affected by the decree, should strictly be parties to the suit (*b*). This is the general rule adopted by a court of equity, which, as it does not confine its decree to the mere decision of the question at issue between the principal parties, but determines all points of controversy which may arise out of the principal question, and gives directions thereupon, which may affect persons remotely or consequentially concerned in interest; will not make such decree, unless the persons so concerned are brought before the court, to assert or defend their particular rights (*c*).

This rule, however, is not so strict, but that it may, in some cases, be dispensed with;—as where, from the multitude of the parties, it would be inconvenient or impracticable; "the court preferring to go as far as possible towards justice,

(*b*) 2 Eq. Ca. Abr. 176. 2 Atk. 296, 515. 7 Ves. 563. 1 Meriv. 262. 16 Ves. 325.

(*c*) 3 P. Wms. 333. Mit. 134.

rather than deny it altogether" (*d*). So, where the interest of the party is very remote (*e*), or his rights depend upon the establishment of prior claims (*f*), or where there is already before the court a person competent to protect them: and in general it may be put negatively, that none are required to be parties who are not bound by the decree (*g*); as, on the other hand, none are bound by the decree, who are not parties to the suit (*h*).

Thus, then, all persons whose *rights* are necessarily involved in the litigation before the court, are necessary parties. But their *rights* must flow from some *relation* existing between them, and the principal parties to the suit. Relations, we have seen, are either, 1st, *original*; or, 2nd, *derivative*; or, 3rd, *collateral* (*i*). It is clear, that all those who are parties to the original relation, must also be parties to the suit commenced by any of them touching such relation, or the incidents belonging to it; unless such parties as may be passed over from remoteness of interest—as a remainder-man, after a vested estate of inheritance (*j*). So all *derivative* parties, so far as

(*d*) 16 Ves. 329; per Ld. Eldon, C.

(*e*) 2 Eq. Ca. Abr. 166. Mitf. 139.

(*f*) Mitf. 142. 2 Vern. 527. Amb. 564. 16 Ves. 327.

(*g*) 3 P.Wms. 310, in note.

(*h*) 1 Ball & Beatty, 447.

(*i*) *Vide ante*, p. 256.

(*j*) Mitf. 141.

their newly acquired rights may be affected by the question between the original parties, or their acquisition of new rights may affect the original rights. So, likewise, if a derivative party commence a suit against any of the original parties, it may be necessary to bring his *collaterals* before the court, if their collateral rights may be endangered or called in question by the suit:—as where the devisee is compelled to make the heir-at-law a party, when he claims to have the will established (*k*). It is upon collateral rights that cross-bills are generally filed.

We have thus far ascertained, at least in general terms, what parties ought to be named in the original bill; and if any such should be omitted, they may be added at any period afterwards, by way of amendment (*l*). But where any of the parties to the original relation come into existence after the bill is filed—as on the birth of a tenant in tail (*m*); or where the *derivative* relation, which makes the addition of a new party necessary, is created subsequent to the commencement of the suit; or if the *collateral* relation accrues by an event subsequent, there must be a *supplemental* bill, to bring such new parties before the court (*n*). This is, however, only in case the new parties are required

(*k*) 2 Ves. 431.
(*l*) *Vide ante*, p. 84—5.
(*m*) Mitf. 49.
(*n*) *Ante*, p. 179.

to be *added* merely to the original suit, and who should have been named as parties in the original bill, or might have been made parties by amendment afterwards, had such parties been in existence, or had the derivative or collateral relation occurred before the bill was filed: and this is the true test for ascertaining when new parties may be *added* by supplement merely.

Abatement is either *of the suit*, or *as to a party*. A suit is said to abate, when, in consequence of some event, there is no longer any person before the court, by or against whom the proceedings can be carried forward. Abatement as to a party is, where the interest and title, or liability of the party, having ceased, it is no longer necessary to have such party before the court. When, in consequence of some derivative relation, a new party is required to be *substituted*, in the room of one of the original parties, and not *added* only, it is clear that the substitution works an abatement, as far as regards the original party. Now derivative relations are produced, either, 1st, by the death of a party; 2nd, by a voluntary transfer of interest; 3rd, by the act of law; or, lastly, by succession.

As to the *first*, it is obvious, that where derivative rights have devolved upon a new party by the *death* of an original party, there is necessarily an abatement as to the *party*, and the

substitution of the new party will be a revivor as to him; but unless the deceased had been a *sole* complainant or defendant, even though he be a *principal* party, the *suit* has not abated by the death; because there are still before the court parties, by or against whom the proceedings may be carried forward. Nevertheless, if in such case the interest of the deceased party is transmitted to his representatives, so that it is necessary to have such representatives before the court, the suit becomes to that extent *defective*, and can only be continued by a revivor as to the representatives of the deceased party (*o*).

A derivative relation, by the voluntary act of the party, can only be created by an assignment of interest in the matters in litigation: if it be an assignment of part only of his interest, the new party, in respect of his new rights, ought to be *added* to the suit, by way of supplement: and here it is clear there is no abatement. If the assignment be of the party's whole *interest*, as it is no longer necessary to have such party before the court, there will be an abatement as to the party, whenever the assignee is substituted; but not until then: for in effect, if the alienation of the property *pendente lite* be not disclosed, the suit will proceed, without the addition or substitution of the derivative parties, who will, not-

(*o*) *Vide* Dict. in Boddy *v.* Kent, 1 Meriv. 364.

withstanding, be bound by the decree, since they thus tacitly submit to purchase the property, under all its circumstances of hazard, and subject to the event of the suit (*o*). If, therefore, their newly acquired rights are materially affected by the decree, their only remedy will be an original bill, something in the nature of a cross bill (*p*). On the other hand, if their newly acquired rights so far affect the original rights, as that the decree cannot be put in force without making them parties; on this fact being discovered, they must be added by supplemental bill, to carry the decree into execution (*q*).

Thus, though when a party assigns his whole interest *pendente lite*, and the assignee is made party to the suit in his room, there is an abatement *as to the party* assignor: yet in no case, even where the party assigning his whole interest is sole complainant or defendant, does such assignment cause *ipso facto* an *abatement of the suit*; for an abatement of the suit only happens where there is no longer any person before the court, by or against whom the proceedings can

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(*o*) '*Pendente lite nihil innovetur*' Co Litt 344, b and *vide* 2 Atk 174 Ambl 676. 11 Ves. 195. 2 Ves & Beames, 204, *et seq*

(*p*) Mitf 58. 2 Atk. 174, 3 Atk 57

(*q*) Mitf. 57

be carried forward. But we have just seen that the suit may be proceeded with, notwithstanding the assignment of the party's *entire* interest. Indeed the principle is carried to such an extent, that it seems a man may bring two bills at his own expence, making use of the name of his assignor in one: nor can the court say he shall be stopped in that one (*r*).

If, indeed, the suit be proceeded with, notwithstanding the assignment, and such assignment be known, the want of interest may be used in the defence, as a plea in bar; and therefore, if the assignment be on the part of a *sole complainant;* the suit in his name will necessarily be rendered ineffectual, not because there is no longer before the court a person competent to conduct it; but because the *cause of action* is transferred to another. This, though it in effect puts an end to the suit, is not however an *abatement;* and if three terms elapse without any further proceeding, the bill may be dismissed. The assignee of the complainant may, in the mean time, however, commence *a new suit* in respect of his acquired interest, which will have a reference, so far, to the original proceedings, as that he may crave the benefit of them. The bill necessary to be filed by the assignee of a sole

(*r*) Ambl. 546.

complainant, therefore, will be an *original bill, in the nature of a supplemental bill* (*s*).

If the assignment be on the part of a *sole defendant*, though there is an abatement *as to the party*, there is no abatement *of the suit:* and consequently the complainant may file a bill, stating the change of interest which has occurred, and substituting the assignee as the new defendant: but such bill being only in continuation of the former, will be *supplemental* merely, though in the nature of a bill of revivor, so far as regards the abatement as to the party.

This difference between a sole complainant and a sole defendant, is farther accounted for on this principle: that the defendant shall not be allowed to take advantage of his own act to bar the complainant's right during the pendency of a suit, but the suit will continue against the assignee of the interest, who takes it with all the liabilities attached (*t*). The distinction between the marriage of a feme plaintiff and a feme defendant, as it affects the suit, rests upon similar grounds. If a *feme plaintiff* marries *pendente lite*, although her interest in the subject of litigation be not gone, yet she voluntarily deprives

(*s*) Mitf. 51.

(*t*) Ambl. 676. 2 Ves. & Beames, 200.

herself of all *title* to sue alone; in consequence of which the suit becomes abated, and the husband, *jure uxoris*, together with the wife in respect of the *interest* remaining in her (being but one person in contemplation of law,) must be *substituted* for the feme sole complainant, by revivor (*u*). On the other hand, a feme sole defendant cannot by her own voluntary act discharge herself from liability (*v*); but such liability is annexed to the person of her husband, who should therefore be named in all subsequent proceedings(*w*): and such is manifestly no abatement of the suit.

In general terms, it may be stated, that no circumstance causes an abatement *of a suit*, which would not be valid as a plea in abatement, although such circumstance may produce an abatement *as to a party*, and although the suit may thereby be *barred*. It is a want of attention to this distinction, between a suit being *abated*, and a suit being *barred*, which has caused all the uncertainty and contradiction as to the effect of bankruptcy, or insolvency, pending a suit (*x*)

(*u*) 1 Vern. 318. 1 Ves. 182.

(*v*) Beames' Pleas, 283. Gilb. For. Rom. 174, 175.

(*w*) *Ibid.*

(*x*) *Vide* Beame's El. of Pleas, 286, *et seq.*, and the cases there cited.

The property of a bankrupt, or insolvent, is, by law, transferred to assignees, chosen in a particular way, who hold such property *in trust*, for the benefit of the creditors, and ultimately for the bankrupt, or insolvent (*y*). This transfer of property produces the third class of derivative relations above enumerated; namely, *by act of law*. Now bankruptcy, or insolvency, can only be taken advantage of by *plea in bar* (z), and consequently, they cause no *abatement* of the suit (*a*). Nor do they even, strictly speaking, produce an abatement *as to the party*; for as the assignees are in the character of trustees, they hold the property committed to them, not in their own right, but in right of the bankrupt or insolvent; and are the representatives of whatever interest remains in him. That some interest continues in him is clear; for after payment of his debts, he will be entitled to the surplus of property, if any (*b*): and in some instances the bankrupt is permitted to follow up the suit in his own name (*c*); though in such

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(*y*) 6 Ves. 485. 15 Ves. 8.

(*z*) Mr. Beames classes bankruptcy and insolvency among pleas to the person; in which he professes to follow Lord Redesdale. (El. Pleas, 120). But Lord Redesdale expressly makes it a plea in bar, under the head of *want of interest*. Mitf. 189. And see the next Chapter.

(*a*) Cooper, Tr. 76.

(*b*) 15 Ves. 8.

(*c*) Mitf. 52. 1 Atk. 263.

case, he must bring the assignees before the court (*d*). In all cases, therefore, even where the bankrupt or insolvent is the *sole complainant*, his assignees may come before the court, and have the benefit of the former proceedings, by supplemental bill (*e*); for as they come in merely in a representative character, it is rather a change of *persons* than of *parties* to the suit, which remains exactly in the same condition as before. For the same reason, if any parties, suing or sued *en auter droit*, are changed or removed, their successors *in the same right* continue the litigation by supplement only (*f*).

The last species of derivative relations mentioned above, is that which accrues by *succession*; or where a new party comes in to the same interest, but by a different title,—as in the case of succession to a benefice. This must happen either by the death or removal of the former party. On the principles already established, it is clear, that in case of death, the suit is abated; in case of removal, the suit is barred; and in all cases there is an abatement as to the party, when the successor is *substituted*. Here, therefore, the parties must commence the proceedings

(*d*) 18 Ves. 424.

(*e*) Coop. Tr. 76; and see 1 Ves. & Beames, 500. See 1 Atk. 263. 4 Ves. 387.

(*f*) 1 Atk. 89. 3 Atk. 216

de novo; and the original proceedings will be of no further avail, than, that on being referred to, they may be a ground work for the court to adopt similar proceedings in the new suit (*g*). Such original bill is therefore said to be in the nature of a supplemental bill.

SECTION II.

Of the Form and Structure of Supplemental Bills.

The subject of every kind of bill, is the statement of some grievance or hardship, arising out of the relative position of the parties, and the grounds on which it calls upon the court for relief. Now, in a Supplemental Bill, the grievance complained of is, that there exists some defect in the suit already before the court, by means of which complete justice cannot be attained; but which, nevertheless, cannot, from the nature of it, or from the state of the proceedings, be remedied in the ordinary way of amendment.

We have seen, that the bill should, in all cases, commence by stating the relation between the parties; and next deduce therefrom the cause

(*g*) Mitf. 57. And see 9 Ves. 37 to 67.

of complaint. In a supplemental bill, the cause of complaint grows out of the position of the parties to the original suit; and therefore the statement of the *relation* in a supplemental bill, will be a statement of the original bill, and of the proceedings thereon: the statement of *grievance* will be of the new matter which causes the defect in the original suit. This is always introduced by the words—"and your orator further sheweth, by way of supplement, to your Lordship." The bill then proceeds to pray for a *subpœna, to the end* that the defendant may answer the new supplemental matter thus put in issue, and that the court may grant further relief, grounded on the supplemental statement: or if the defect in the suit arises from a change of parties, a *subpœna* is prayed against the new parties; to the end that they may answer the premises, and that the complainant may have the benefit of the former proceedings as against them, and the same relief as he would be entitled to against the original parties.

Here it is obvious, the *third part* of the bill, according to our division, that which contains the pretences and charges, needs in no case be inserted, unless where the supplemental matter seeks for further discovery; and the formal clause of equity, which suggests the jurisdiction of the court, is of course unnecessary, since the

supplemental bill is only in continuation of the proceedings already before the court. Indeed it has been shewn, in a former page, that these parts are not essential, even to the original bill: and thus a supplemental bill is, in all respects, analogous in its structure to an ordinary bill, and corroborates the principles we have before laid down concerning bills in general.

SECTION III.

Of the Form and Structure of Bills of Revivor; and of Bills in the Nature of Bills of Revivor.

In those cases where a Bill of Revivor may be filed, the hardship complained of is, that by the abatement of the suit, the complainant would be compelled to renew the same proceedings against persons who stand in precisely the same relation as the parties to the original suit, and against whom therefore he has the same claims; unless the court shall apply a remedy, by allowing the original proceedings to be *revived*, for or against the new parties. To make out such relation, therefore, the bill of revivor must state the original bill, and the proceedings upon it; and further, that the new parties hold exactly the same place in the original relation, as the

persons through whom they derive; and therefore are invested with similar rights and duties.

This is always the case, where the new parties come in, after abatement, *by the act of law*;—such as the heir at law, who comes in as the representative of the deceased, in regard to his real estate; the executor or administrator, who represents him as far as regards the personalty; and the husband, *jure uxoris*, who must join with the feme plaintiff to sustain the suit. In all these cases, therefore, the relation will be sufficiently made out to give a title to revivor, by merely stating that the new party is the heir at law, or executor, or administrator, or the husband of the feme plaintiff, and there is no question put in issue but as to the person of the party. This is the case of a bill of revivor, properly so called; which thereupon proceeds to state, 'that the complainant is, as he is advised, entitled to have the said suit revived against the defendant, and restored to the same plight and condition as previously to, and at the time of the abatement;' and therefore prays a *subpœna* against the defendant to appear, and shew cause, if he can, why the suit and proceedings should not stand, and be revived against him, *to the end* that the suit may be revived.

When the new party comes in after abate-

ment, not by the act of law, but *by the act of the party*,—as in the case of a devisee, who comes in under the will of the testator,—to make out such a relation as will entitle to revive, it will be necessary to go one step farther, and to shew not only the state of the former proceedings, and that the new party is the devisee, but also that *the act of the party*, by which the rights and duties have devolved upon him, is valid: and here, it is manifest, a considerable question is put in issue; until which is disposed of, either by admission or by proof, the title to revive is not fully established. This, therefore, is no longer a bill of revivor merely, but an *original bill in the nature of a bill of revivor*. This kind of bill, then, after shewing the abatement, and the transmission of interest to the new party, proceeds to state, that notwithstanding such abatement, the complainant is, as he is advised, entitled to have the same relief against the defendant, as might have been decreed between the parties in the original suit; and then expressly *charges* the validity of the instrument, by which the interest of the new party has been transmitted.

Here we are furnished with an exemplification of what we have laid down in a former part of this chapter, concerning the nature and use of the *charging part* of a bill. Thus, the relation

is here sufficiently made out, by merely shewing the abatement and devise, so as to give a *primâ facie* title, which is the proper function of the stating part of the bill; and the *charge* is introduced to anticipate and controvert the defence which may be set up; *viz.* that although such a devise was made, yet that it was not valid and effectual in law (as, for instance, that the testator was not empowered to dispose of his real estate by will); which brings the point at once to issue between the parties: and such, we have seen, is the peculiar province of the charging part.

The bill next goes on to pray for a *subpœna*, in the common form, *to the end* that the defendant may answer the premises; and that the same benefit may be had of the old suit, as if it had not abated; or that the defendant may shew good cause to the contrary.

A supplemental bill in the nature of a bill of revivor, is similar in principle to this last, except that, not being the consequence of an abatement of the suit, it partakes somewhat of the qualities of a supplemental, and not an original bill.

SECTION IV.

Of the Form and Structure of the Original Bill in the Nature of a Supplemental Bill.

In the bills we have just described, the mere statement of a valid transmission of interest to the new party, is sufficient to establish such a relation as will give a title to the benefit of the former proceedings; because the new parties to such bills are derivative parties, by privity of *blood*, or *representation*, or *contract*; and in such cases, the derivative interest carries along with it the original title and liability. But where the new parties are derivative by privity of *estate* only—as in the case of a successor to a benefice, or of a remainder-man to a tenant in tail, the acquisition of interest is not accompanied with either the old title, or the old liability; but a *new* title, and a *new* liability will spring from the possession of the *estate*, which *may perchance* be similar to the former, as arising out of the same matter of litigation.

In such case, therefore, there must be a new suit altogether; and if in the new suit the injury complained of, and the redress sought, be similar to the former bill, in general the complainant will have the benefit of the former pro-

ceedings, so far as to have the new suit considered as supplemental to the original suit. To obtain this end, however, it will not be enough to shew that there has been a transmission of interest, but it will be necessary to state such a new relation as will prove that the *new* title, or the *new* liability, is similar to the old, and that the complainant is in consequence entitled to the same or similar relief; or, in other words, that the new suit is the same in substance with the original one, and therefore may be made supplemental to it. This bears a strong analogy to the practice of consolidating suits, which is done on special motion for a reference to the master, to see if two suits are for the same purpose (*i*).

The *Original Bill in the nature of a Supplemental Bill*, states therefore the original bill at full length, with the proceedings upon it; the manner in which the succession of interest has accrued; next, the circumstances which make the relation similar; and, finally, it prays for a *subpœna* against the defendant, *to the end* that he may answer the premises, and that the complainant may have similar relief against him to that which was prayed in the original bill.

(*i*) 16 Ves. 344.

SECTION V.

Of the Form and Structure of Bills in the Nature of Original Bills.

We shall now briefly notice the structure of the remaining bills of such nature, that though they are strictly original bills, yet the injury they complain of proceeds out of a former suit. These are cross bills,—bills of review,—bills to set aside a decree obtained by fraud,—bills to suspend a decree, and bills to carry a decree into execution.

A *cross bill* is a species of defence used for the purpose of obtaining a discovery necessary to the defence (*j*), or when it would be too late to use the same defence by way of plea (*k*); or, lastly, to obtain some relief founded on the collateral claims of the party defendant to the original suit (*l*).

In the *first* of these cases, the former suit causes the relation on which is founded the

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(*j*) Mitf. 64. 3 Atk. 812. Mos. 382.

(*k*) Mitf. 64. 3 Ch. Rep. 19.

(*l*) 2 Cox. 78; and see *ante*, p. 48.

right to discovery; and consequently, that suit and the proceedings upon it must be stated in the cross bill. The discovery, when obtained, if material, must be added to the original answer by way of supplement; for the answer to the cross bill cannot be read as a defence at the hearing of the original cause (*m*).

In the *second* instance, the cross bill is in the nature of a *plea puis darrein continuance:* as, for example, where some occurrence has happened after the cause is at issue, which would have been a good ground of plea in bar;—such as a release from the plaintiff. Here the statement of *relation* is of the former bill and proceedings, and the new occurrence which creates the bar: the *injury* is, that the suit is notwithstanding proceeded with, and that the complainant, in the cross bill, cannot use the defence as a plea in bar; and he therefore prays a *subpœna, to the end* that the premises may be answered, and that the new defence may be declared a sufficient bar to any further proceedings; and that therefore the original bill may be forthwith dismissed with costs. This kind of cross bill is necessary, in order to put the new defence in issue, without which the court could have no judicial cognizance of it at the hearing (*n*).

(*m*) 2 Ves. and Beames. (*n*) 3 Ch. Rep. 19, 16.

A cross bill, filed for the *last* purpose above mentioned, *viz.* for collateral relief, differs in no respect from the common form of an original bill, but must state the collateral relation;—the injury sought to be redressed; in which part is generally included, the reference to the former bill;—pretences and charges, when necessary,—being, for the most part, pretences of some of the allegations in the original bill, and charges to the contrary;—and, lastly, the prayer for *subpœna, to the end* that the defendant may answer the premises, and the court may decree such relief as the nature of the case may require. As a cross bill is considered merely as a species of defence (*o*), and concerns matters already in litigation before the court, it will not be necessary, at least as against the complainant to the original suit, to shew any ground of equity to support the jurisdiction of the court (*p*).

A bill of review is either on error apparent, or on discovery of new matter (*q*). When it is brought for *error apparent*, after reciting the former proceedings, and the substance of the decree pronounced in which the error appears, it proceeds to state, that 'the said decree has since

(*o*) 3 Atk. 812. Mos. 382. (*q*) *Vide ante*, p. 171.
(*p*) Hardr. 160.

been duly signed and enrolled, and which said decree the complainant humbly insists is erroneous, and ought to be reviewed, reversed, and set aside, for many apparent errors and imperfections, inasmuch as it appears,' &c. Then, after shewing the errors relied on, a *subpœna* is prayed, *to the end* that the statement may be answered, and that the decree may be reviewed, reversed, and set aside, and no further proceedings taken thereon.

When the bill of review is brought on the *discovery of new matter;* after stating the enrollment of the decree, the bill proceeds—'and your orator sheweth unto your Lordship, by leave of this honourable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree, your orator has discovered, as the fact is,' &c. stating the new matter relied on as a ground for reviewing and reversing the decree. 'And your orator is advised and humbly insists, under the circumstances aforesaid, that the said decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed.' It next prays a *subpœna, to the end* that the defendant may answer; and that the decree may be set aside; and that further directions be added, if required, on the supplemen-

tal matter; and for such general relief as the circumstances of the case may require.

A bill to impeach a decree on the ground of fraud, is in many respects similar to the last-mentioned, only the circumstances explanatory of the fraud charged, must be stated by way of inducement to the relation arising out of the proceedings, and the decree alleged to be fraudulently obtained. The complainant must then set out the circumstances of fraud under which the decree was obtained; and that having lately discovered the same, he applied to the defendant for redress, and not to insist on the decree. The *injury* complained of is, the defendant's refusal to comply with this request; to which is always added, a pretence of the validity of the decree (which anticipates the defence), and a charge to controvert it; together with whatever other charges may corroborate the statement of fraud. The *subpœna* is prayed, *to the end* that the defendant may put in his answer, and that the decree may be set aside, and declared fraudulent and void; and for such other relief as the case may require.

The remaining two species of bills, above enumerated, *viz.* bills to *suspend*, and bills to *carry a decree into execution*, are merely in the nature

of a petition in the cause; only that the cause being concluded by the pronouncing of the final decree, the parties must be again brought before the court by an original bill.

In the former, the complainant must shew the special circumstances on which he grounds his title to have the decree suspended; and then state that he is, as he is advised, entitled to have the decree, or part of it, suspended as against him, upon such equitable terms as he thereby offers, and so pray accordingly.

In the latter, the complainant must set out a sufficient reason why the decree has not been carried into execution, and also the circumstances which impede the execution of it at the time of filing the bill; and state that though 'he is desirous of having the said decree forthwith carried into execution, yet, that from the circumstances aforesaid, he is advised that the same cannot be done without the assistance of the court;' which he prays accordingly, 'and that the defendant may be ordered to do and concur in all necessary acts for that purpose.'

We have thus endeavoured to explain, in general terms, the form and structure of a bill in

chancery; so that the student may be at no loss to apply the general principles to the particular case which comes before him; and we have also pointed out the peculiarities in the frame of secondary bills, which, however, form no exception to the general rules, but are, rather, particular instances, illustrative of the universal theory. As informations differ in no respect from ordinary bills, but in their form, we have not thought it necessary to give them a separate consideration. It only remains for us at present to add such orders in chancery, as relate to the mere drawing of the bill.

In Lord Bacon's Ordinances, published in open court in the year 1618, the 55th and 56th sections are as follows: "55. If any bill, answer, replication, or rejoinder, shall be found of an immoderate length, both the party, and the counsel under whose hand it passed, shall be fined" (r). "56. If there be contained in any bill, answer, or other pleadings or interrogatory, any matter libellous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's courts, such bills, answers, pleadings, or interrogatories, shall be

(r) Beames' Ord. Chan. 25.

taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court; and the counsellors at law who have set their hands, shall likewise receive reproof or punishment, if cause be" (*s*).

These regulations were further enlarged by Lord Coventry in the orders published by him, A. D. 1635 (*t*), and subsequently adopted by Lord Clarendon, in 1661 (*u*). In the collection of rules and orders that go under his name, under the title 'Bills,' it is ordered, "That no counsellor do put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused by himself in the paper draft, before it be engrossed, (which they shall do well for their own discharge to sign also after perusal) and counsel are to take care that the same be not stuffed with repetition of deeds, writings, or records *in hæc verba;* but the effect and substance of so much of them only, as is pertinent and material to be set down; and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other impertinencies, occasioning needless prolixity;

(*s*) *Ibid.*

(*t*) Beames' Ord. Chan. 69.

(*u*) Beames' Ord. Chan. 165.

to the end, the ancient brevity and succinctness in bills and other pleadings may be restored and observed: much less may any counsel insert therein matter merely criminous or scandalous, under the penalty of good costs to be laid on such counsel, to be paid to the party grieved, before such counsel be heard in court." "If there be matter scandalous in a bill, a Master of Chancery is to expunge it, and to tax costs for the party scandalized; but if on such reference the Master reports the bill not scandalous, the party procuring such reference shall pay costs to the plaintiff for such his reference."

CHAPTER IV.

PLEAS AND DEMURRERS.

We now come to those pleadings which are used on the defence, and which either submit to answer and contest the suit, or which shew some reason why the defendant is not called upon to answer: as that the court has not *jurisdiction*; or that the suit has *abated*, or is *defective*, or *barred*. When the defendant submits to contest the suit, he puts in an *answer*: he shews cause against answering by either *demurrer*, or *plea*. As the plea in bar likewise contests the suit, so far as it insists that the cause of action either never existed, or is gone; so, in many cases, where the defendant does not require to protect himself from discovery, or that he must answer as to other particulars, he may insist upon the bar by answer, as effectually as by plea (*a*). As pleas and demurrers are used as objections to the being compelled to answer, we shall commence our observations with them,

(*a*) Mitf. 249. 1 Atk. 54. 2 P. Wms. 145.

and afterwards treat of the form and general requisites of answers.

SECTION I.

Of the general Nature of the Defence by Plea or Demurrer.

In a preceding chapter we have pointed out the distinction between pleas and demurrers in equity, and their analogy to the same species of defence at common law: and it there appears that the essential difference between a plea and a demurrer is, that the latter is merely an *issue in law* on the complainant's own shewing; the former always puts *matter of fact*, as well as of *law*, in issue (*b*). Hence, wherever the objection to answer is founded on a matter of fact not admitted by the bill, and which therefore may be disputed, advantage of such objection must be taken by *plea*, in order that the complainant may have an opportunity to reply, and so take issue upon it. If the objection is apparent on the face of the adverse pleading, and therefore no question of fact can arise, the defendant may *demur*. With the restriction just mentioned,

(*b*) *Vide ante*, p. 232—233.

the objections taken, both by plea and demurrer, are the same; so that in this point of view the ensuing observations will apply equally to both.

The student will recollect that we formerly laid down the propositions of a bill to be—1st. that from the relation stated accrues the right to *discovery*, and such *relief* as is prayed for. 2nd. That the relation stated is that which actually exists: and that these propositions admit of any defence which either, 1st. denies the right either to discovery or relief, or both; or, 2nd. denies the relation; or, 3rd. invalidates the relation, or bars the right (*c*).

First, as to the denial of the *right*. This is analogous to the first mode of defence at law, mentioned in the chapter before alluded to; which, admitting the facts of the case, denies the inference or the rule of law sought to be established; which, as we have seen, constitutes a demurrer. In like manner, this defence in equity, while it takes the statement in the bill as true, yet insists that the facts, even as stated by the complainant himself, do not give him a right to discovery or to relief.

In equity there are many cases where, though

(*c*) *Vide ante*, p. 230—1.

the court will not assume a jurisdiction to give relief, yet the complainant will be entitled to a discovery in aid of the jurisdiction of other courts (*d*). In such cases, however, the bill must be a bill of discovery only; and if it should seek any relief, beyond the mere collateral relief of an injunction, or a commission to examine witnesses (*e*), and the like, it may be demurred to (*f*). In other instances, the court will not interfere even for the purpose of discovery; and if the bill should state a case not entitling the complainant to discovery, it may be demurred to, as a bill of discovery merely (*g*). But discovery being, as before stated, incidental to relief where the complainant has a right to the assistance of the court, no demurrer will hold to the discovery (*h*), unless indeed it be to a point which might subject the defendant to penalties or forfeiture, which is a good ground of demurrer (*i*); or if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances

(*d*) Mitf. 42. 149. 2 Ves. 398.

(*e*) 1 Bro. C.C. 471. 2 Ves. jun. 514.

(*f*) Mitf. 149, and the cases there cited. *Vide* also 6 Ves. 62. 11 Ves. 509. 2 Ves. and Beames, 328.

(*g*) Mitf. 150.

(*h*) *Ibid.* and see Forest's Rep. in Exchequer, 129. 6 Ves. 37—8. 1 Swanst. 294.

(*i*) 1 Mad. Cha. Prac. 214, and the cases there cited.

of the case, he may by answer insist that he is not obliged to make the discovery (*j*).

Second: The defence in equity, which denies the *relation* assumed, or, in other words, denies the truth of the facts stated in the bill, is analogous to the plea of the general issue at common law, and is taken advantage of by way of answer; which puts the complainant on the necessity of proving the allegations denied, if material to support his case (*k*). In like manner, the same defence, and with a similar analogy to common law, may be made by denying some particular fact on which the whole relation, and consequently the right, is founded. This last is used by plea, the negative averments of which must be supported by answer also, for the reasons assigned in a previous chapter (*l*).

Third: The defence which *invalidates* the relation, or *bars* the right, is similar, in all respects, to a special plea in bar, at common law. *To invalidate the relation*, therefore, some new matter must be stated, which may shew that the *parties* were incapacitated from contracting the

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(*j*) Mitf. 163, 249. 3 Bro. C. C. 40. 3 P. Wms. 238. 10 Ves. 450.

(*k*) *Vide ante*, p. 104.

(*l*) *Vide ante*, Part ii. cap. 1. sec. 3.

relation, or are incapable to continue it; or that the *subject matter* was insufficient or illegal, or had undergone some alteration; or that the *right*, being incidental, had not accrued; as where a condition precedent had not been performed. Again, new matter may be stated, to shew that the *right*, though once existing, is *barred* by the *act of the party*: by the *act of law*; or, lastly, by the *act of God*, or unavoidable calamity. In all these cases, as new matter must be put in issue, the defence must be by plea.

It is to be observed, that according to the first proposition of the bill stated above, the *right* of which we here speak, and which the defence either denies or invalidates, is *the right to discovery and relief*, which may be termed the *general right*, to contradistinguish it from the *particular rights*, flowing from the relation sought to be established, and which are included in the relief required. It is clear, that the right to discovery and relief involves the consideration of the mode of *applying for redress*, since, if this latter be defective, the court will not interfere, at least until the defect be remedied. All those objections, therefore, which we have noticed before (*m*) as the subject of pleas in abatement,

(*m*) *Ante*, part ii. cap. 1. sect. 1

and to the jurisdiction, are equally applicable as modes of defence in equity, whether by demurrer or plea. In point of fact, there is this distinction to be taken between those modes of defence as used at common law, and as used in equity; that in the former case, general demurrers and pleas in bar are considered as effective answers to contest the suit; in equity, as has been already stated, pleas and demurrers of all kinds are more in the nature of exceptions to answering or contesting the suit; either because the court has not *jurisdiction*; or the suit has *abated*; or is *defective*, or *barred*. And this difference arises from the double character, as formerly noticed, which is sustained by the answer in equity; it being a pleading so far as it denies, and a proof so far as it admits, the allegations of the bill.

In this point of view, pleas and demurrers correspond precisely with the '*exceptiones*' of the civil law, which were either *declinatoriæ*, to the jurisdiction; *dilatoriæ*, in abatement; or *peremptoriæ*, in bar (*n*). These were always argued before the Prætor, as reasons why it would be unnecessary *to give judges* to the parties to contest the suit, since, if the exceptions were allowed, it would be useless for the

(*n*) *Vide* Gilb. For. Rom. 50.

cause to proceed. The two first were valid reasons why the defendant should not *in jus vocari;* the latter, or *exceptiones peremptoriæ,* though going to the very cause of action, and therefore a fit subject for the *judges* to decide, yet being a clear objection *in limine,* it saved the parties much expence and delay, by having the matter disposed of by the prætor in the first instance: and this, as we have seen, is one of the principal advantages of a plea. We have also seen, that with us, in many instances, the same points that might have been available as a plea in bar, are allowed to be given in evidence, under the general issue, or may be insisted upon by way of answer in equity.

The method in the civil law was, that if the peremptory exception was clearly proved before the prætor, he proceeded no farther in the cause; but if the peremptory exception was doubtful, either in point of law, or matter of fact, then he remitted it to the *judges,* to determine it; since it was then proper that it should be put in judgment (*o*). So in equity, upon the argument of a plea, the plea is frequently ordered to stand for an answer, with liberty for the complainant to except: and thus the whole matter is referred to the hearing (*p*).

(*o*) Gilb. For. Rom. 50. (*p*) *Vide ante,* p. 46.

We have, in a former Chapter, observed the close affinity between the method of the Roman law, and that adopted by the *common law* of England; where we have remarked, that our trial by jury is, in reality, nothing more than *giving judges*, after the preliminary pleadings have been decided by the court; and, in many cases, the law is so interwoven with the fact, that the jury are, of necessity, the judges of both; and in one case more particularly, that of libel, by express act of parliament. In like manner, in *equity*, the Masters in Chancery, who were anciently the counsel and assistants to our clerical chancellors, were some of them given as judges: and this is the foundation of the judicial authority of the Master of the Rolls, who is the head of the Masters in Chancery, and as such, entrusted with the keeping of the rolls of the court; whence he derives his name (*q*). So also, at the present day, all matters of account, and such like, are at once referred to a master, to be decided by him. Anciently, when the cause was remitted to the Master of the Rolls, he used to examine the witnesses himself; but in course of time, that duty devolved upon officers deputed by him, and thence called examiners (*r*) (for

(*q*) *Vide* Sir Jos. Jekyll's Treatise on the Judicial Authority of the Master of the Rolls.

(*r*) *Ibid.*

which reason, he has the nomination to that appointment to this day): and hence this proceeding in Chancery is still a remnant of the practice of *giving judges*, to enquire into matters of fact; although the court retains to itself the ultimate decision of the cause, upon the proofs and arguments at the hearing.

SECTION II.

Of the subject matter of Pleas and Demurrers, both to the Discovery and Relief.

Having thus made it appear, that in equity at least, demurrers and pleas are used for the purpose of shewing that the suit ought not to be further contested; it remains now to see what objections will be deemed available to that end. It has been already shewn, that whatever objection holds against the relief sought by a bill, is equally valid against the discovery prayed by the same bill; the latter being incidental to the former (*s*). But as bills are sometimes filed for discovery only, there are some objections which extend to mere discovery; we shall, therefore, take each in its turn: and first of the objections to relief.

(*s*) *Ante*, p. 312.

I. It is material to observe here, that as pleas in equity may be either in abatement or in bar, since the *right* to discovery and relief may be met by objections that go in abatement as well as in bar; so demurrers also, which *deny that right*, may be sustained on either of those grounds. It is different, however, as to answers; because the want of *relation* is an objection in bar; and consequently, the answer, the use of which is to deny, or invalidate the *relation*, is in *bar* only (*t*), and cannot insist upon an objection in abatement.

The annexed synopsis will exhibit, at one view, all the modes of defence to the relief, which may be used in equity; any of which may be taken advantage of, as preliminary objections, by plea or demurrer, to the defendant's answering or contesting the suit, with the exception of that mode which denies the relation; which, being in reality the very '*litis contestatio* itself, must be done by answer, unless where the same thing can be effected by means of the *negative plea*. It was formerly, indeed, matter of doubt

(*t*) "An answer, is that which the defendant pleadeth, or saith *in bar*, to avoid the plaintiff's bill or action, either by confessing, and avoiding, or traversing, and denying, the material parts thereof." West's Symb. 104. Hinde, 196.

how far the negative plea ought to be allowed in equity (*u*), since it was thought that the answer was the most fitting mode of contesting the character in which the complainant sued, and on which his supposed claim was founded. But it has since been determined, and justly, that the negative plea is good; for otherwise, any person assuming a fictitious character, might force a discovery from a defendant, to which, in his real capacity, he would have no right (*v*). For it is an invariable rule, that when a defendant does not plead or demur, but submits to answer, he must answer fully (*w*).

II. We next come to those objections which hold even to discovery, without any relief being prayed: and first, we may lay it down as a general rule, that whatever objections are valid to avoid a discovery, are *a fortiori* good as against relief; or negatively, that where there is no objection to relief, there can be none to discovery; unless where such discovery might subject the party to a penalty or forfeiture. But the converse of this proposition does not hold; for there may be no objection to the discovery, and yet an

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(*u*) Beames' Pleas, 123, *et seq.* and Mitf. 187, 188.

(*v*) *Ibid.*

(*w*) Mazzaredo *v.* Maitland, 3 Madd. Rep. 70. And see 11 Ves. 395, and 16 Ves. 382.

objection to the relief; or, in other words, that which is an objection to a bill for relief, may yet be no objection to a bill of discovery. For as a bill for a mere discovery seeks no decree, so want of equity, or want of proper parties, would be no objection (*x*). But as the discovery, in a *bill for relief*, is only subsidiary to the relief, if there be a valid objection to the latter, the discovery, though otherwise proper, must fall with it (*y*). Care must be taken, therefore, that the bill do not pray relief, when the complainant has a right only to discovery (*z*). And it appears, that even where the answer to a bill of discovery might furnish ground for supposing that relief was in equity, not in law; yet that the bill cannot be amended, by adding a prayer for relief; but that it would be better to direct the complainant to pay the costs, and bring a new bill: and if in that cause any use is to be made of the discovery given by the first answer, to let it be read, as an answer to a bill of discovery, as evidence; not as part of the defence, or admission, upon which the bill proceeds (*a*).

(*x*) Mitf. 163.

(*y*) Mitf. 149. Beames' Pleas. 250; and the cases there cited. See also 3 Meriv. 175. 1 Ves. & Beames, 539.

(*z*) But a mere prayer for *general* relief, or for the *collateral* relief of an injunction, commission, and the like, will not render a bill of discovery demurrable. *Vide* 2 Ves. jun. 514; & *ante*, p. 312.

(*a*) See the observations of Lord Eldon, in Butterworth *v.* Bailey, 15 Ves. 358.

A bill of mere discovery, is always brought in support or defence of a *civil* suit, either in the court itself, or in some other court. In this respect, therefore, the court of equity assumes a jurisdiction to compel discovery, even where it has not authority to extend relief. Consequently, the want of equity will be no good ground to avoid an answer. But if a mere discovery be sought, where the court has not even jurisdiction to that extent;—as if the discovery be sought in aid of a court of criminal jurisprudence (*b*); or of a court which has itself authority to compel the discovery (*c*), the defendant may plead or demur *to the jurisdiction.*

All pleas *to the person* extend to the discovery, as well as to relief; for they are objections to shew that the complainant cannot institute a suit in any court. But, on the other hand, no plea in abatement, on the ground of the *mode of proceeding being defective*, can be used as an objection to a bill of discovery; because such a bill seeks no *decree* from the court. Multifariousness ought, perhaps, to be made an exception (*d*), that the defendant may not be uselessly harrassed.

(*b*) 2 Ves. 398.

(*c*) 1 Atk. 288. 1 Ves. 205. 2 Ves. 451.

(*d*) Mitf. 163.

Next, as to objections *in bar*. As the discovery is only for the purpose of obtaining relief, either in the same, or in another court of justice, any objection, which shews that the complainant can have no right to relief, either *in the same or any other court*, will bar his right to discovery. All the objections *in bar* to relief, therefore, in equity, will be equally valid against discovery in aid of relief *there* (*e*). Yet there is one seeming exception to this rule; namely, as to the objection which *denies that the defendant has such an interest as can make him liable*; for persons, not otherwise interested, are frequently made parties for the mere purpose of discovery; such as the officers of a corporation (which, as it answers under seal, cannot be indicted for perjury), or attornies, auctioneers, agents, and arbitrators, when charged with being parties to a fraud (*f*). But further, if the complainant has no right of action in *any other court*, he can have no title to discovery in *this*; and the want of such right may be pleaded in bar, or objected by demurrer (*g*). And even though the complainant should have such right, yet if the de-

(*e*) 2 Ves. 71. 3 Meriv. 175. 1 Ves & Beames, 539. And see Lord Alvanley's observations, in 3 Ves. 347.

(*f*) *Vide* Beames' Pleas, 132; and the cases there cited.

(*g*) Mitf 152. 3 Bro. C. C. 154. 3 Ves. jun. 491. 13 Ves. 240.

fendant has an equal claim to protection—as where he is a *purchaser for valuable consideration, without notice*, the court will not interpose, even to compel a *discovery*. This last plea, therefore, is equally a bar to discovery, in aid of the jurisdiction of other courts, as it is to relief, and consequently to discovery, in this (*h*).

There are yet some objections peculiar to discovery, as regarded in the light of an examination. Thus, a defendant may refuse to answer any question that would subject him to a penalty or forfeiture (*i*), unless such forfeiture be waived by the person competent to do so (*j*): or that would cause a breach of the confidence reposed in him, as counsel, attorney, or arbitrator (*k*). And this arises from the peculiar nature of a bill, which is both a pleading and an examination. The objections, on such grounds, may be taken to the bill, in its character of a pleading, by plea or demurrer; but as it is also an examination, the defendant may, without demurring or pleading, decline answering to the objectionable

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(*h*) 2 Cha. Ca. 72. 1 Vern. 27. 1 Ventr. 198. 2 Ves. jun. 454.

(*i*) 1 Bro. C. C. 98. 1 Atk. 529. 2 Ves. 389. 2 Atk. 392.

(*j*) 1 Vern 109, 129, 306. 1 Chan. Rep. 144. 2 Atk. 393.

(*k*) 1 Cha. Ca. 277. Finch. Rep. 82.

parts (*l*). And this is the only exception to the general rule, that when a defendant submits to answer, and neither pleads nor demurs, he must answer fully (*m*). For reasons grounded on similar principles, if the discovery sought be *immaterial* to the relief required, either in the same or another court, the bill, which seeks such discovery, may be demurred to; or matter may be pleaded, to shew that the discovery, when obtained, would be immaterial (*n*).

SECTION III.

Of the Defence to Bills not original.

The objections which are peculiar to bills not original, are chiefly in the nature of objections to the form of proceeding;—as where a devisee files a bill of revivor (*o*), when, as we have before seen, his proper course would be by original bill, in the nature of a bill of revivor; or where a complainant states, by way of supplemental bill, facts, which might have been added by

(*l*) Mitf. 163, 249. 3 Bro. C. C. 40. 3 P. Wms. 238. 10 Ves. 450.

(*m*) 3 Madd. Rep. 70.

(*n*) Mitf. 155, 156. 1 Bro. C. C. 96. 2 Atk. 387, 394. 2 Ves. jun. 396.

(*o*) 1 Cha. Ca. 174.

amendment (*p*); or amends his original bill by adding new facts, which had occurred since the institution of the suit, and which therefore are the subject of supplemental matter only (*q*).

So, in like manner, if a person, not a party, or privy to the original suit, brings a bill of review, the defendant may demur; or if such bill be brought against a defendant, not a party to the original bill (*r*). But any matter, which shews that the right, though existing at the time when the original bill was filed, had been subsequently barred,—as by release, fine, and non-claim (*s*), statute of limitations (*t*), or decree enrolled twenty years (*u*),—may be pleaded against the secondary bills. Wherever new matter is introduced, either by supplement, or in a bill of review, such new matter is liable to any objection which might be made to it, if stated in the original bill (*v*).

The proper defence to a bill of revivor, is by plea or demurrer; because if the party makes

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(*p*) 3 Atk. 817. 2 Mad. Rep. 240.

(*q*) 1 Atk. 291.

(*r*) Gilb. For. Rom. 186. 1 Chan. Ca. 123.

(*s*) 2 Vern. 190.

(*t*) 1 P. Wms. 742.

(*u*) 5 Brown. P. C. 466. 6 Brown. P. C. 395. 1 Vern. 287. 1 Ves. & Beames, 536.

(*v*) Mitf. 236.

the same objection by answer, it cannot be determined till the hearing. Nevertheless, if at the hearing, it does not appear that the complainant had a title to revive, although the defendant did not take advantage of the objection in any manner, he shall gain nothing by his bill (*w*).

The regular defence to a bill of review, for *error apparent*, is to plead the decree in bar to the new suit, and demur to opening the enrolment (*x*), on the ground, that the errors assigned are not such as to entitle the complainant to have the decree *reviewed*, much less *reversed*. The first question, therefore, is, whether the enrollment should be opened, and the decree *reviewed*; and this is argued upon the demurrer, when nothing can be read but what appears upon the face of the decree: if the demurrer be overruled, then arises the second question, whether the decree ought to be *reversed*; and the complainant is at liberty to read bill and answer, or any other evidence, as at a rehearing, the cause being equally open (*y*).

The plea of the decree is proper in this case;

(*w*) 3 P. Wms. 348; and see *ante*, Part 1, cap. 16.

(*x*) 1 Vern. 392. 2 Atk. 534.

(*y*) 1 Atk. 299.

because it is the very foundation of the defence, which is proveable by the record: and though it appears on the face of the bill, yet it is there sought to be impeached, on the ground of error apparent; which error being a question of *law* only, is rightly denied by demurrer: as likewise, in a similar manner, when a bill is brought to set aside a decree, on the ground of fraud, the decree itself is pleaded in bar; and the fraud, which is a question of *fact*, is denied by answer, in support of the plea, as well as by negative averments in the plea (z).

Where a bill of review is brought, on *discovery of new matter*, a case can scarcely occur, where it will be necessary to plead or demur; as the leave of the court must be had before the bill is filed. The fact of the discovery, however, may be contradicted by plea, or traversed by answer; and in general, the new matter is liable to any objection, which would have been good ground of defence to it in the original bill (a).

A demurrer for want of equity, will not hold to a cross-bill; for the defendant being drawn into court by the complainant in the original bill, he may avail himself of the assistance of the court, without being obliged to shew a

(z) See *ante*, p. 266. (a) Mitf. 236.

ground of equity to support its jurisdiction (*b*). For the same reason, such bills are not liable to any objections to the person, except the informality of the bill being exhibited in the name of a person, who is incapable of instituting a suit alone (*c*).

SECTION IV.

Of the general Form and Structure of Pleas and Demurrers.

Our next consideration will be, as to the form and general requisites of pleas and demurrers. The defendant being called upon by the *subpœna* to answer the interrogatories in the bill, must do so, or shew good cause to the contrary: the office of pleas and demurrers, is to state such cause. Hence the substance of all pleas and demurrers is, in effect, nothing more than the statement, with certainty and precision, of some of those objections, which are to be found in the synopsis of the modes of defence, 'wherefore the defendant demands the judgment of the court, whether he shall be compelled to answer and contest the suit; and prays to be dismissed with his reasonable costs.'

(*b*) Hard. 160. 3 Atk. 812. (*c*) Hinde, 190.

Thus the demurrer contends that the case made by the bill, *(admitting it for the sake of argument to be correct)* (e), is yet not such as to entitle the complainant to an answer (f); either *because* the case, as stated, does not contain some essential ingredient necessary to establish the right; or, *because* some fact is therein stated, which operates as an avoidance to the right (g). Again, the plea admits, *for the sake of argument*, that the facts stated in the bill are true (h), and that the legal inference drawn is correct; but it *avers* that there are other circumstances connected with the case, which displace the equity (i); or which, in other words, by changing the nature of the relation between the parties, avoid the right established by the bill. The negative plea differs only in this, that instead of averring new facts, it denies some one essential position of the bill, admitting, *for the sake of argument*, that all the rest of the facts relied upon are true.

From this view, it is apparent, that the essential part of a plea or demurrer is the assignment of the reasons on which the defendant relies for

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(e) 2 Ves. jun. 95.
(f) 3 Meriv. 503.
(g) 3 Ves. 255.
(h) 2 Atk. 51.
(i) 1 Bro. C. C. 417. 1 Atk. 54. 3 Atk. 341. 15 Ves. 376.

not answering; and this is the substance and *body* of the pleading: which consists of the enumeration of the causes of *demurrer*, or the averment of the facts which constitute the *plea*. There are, besides, a formal commencement and conclusion, each of which performs distinct functions; and therefore the pleading may, with sufficient convenience, be divided into three parts. 1st, the commencement; 2nd, the body; and, 3rd, the conclusion. We shall here subjoin the skeleton form of a demurrer, and of a plea, and then add some remarks upon each part, in its order.

The Demurrer of C. D. Defendant, to the Bill of Complaint of A. B. Complainant.

[I.] This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained, to be true in such manner and form as the same are therein set forth, doth demur thereto; [II.] and for cause of demurrer sheweth, that [the said complainant hath not by his own shewing made out a case which establishes his right, title, or interest: or, that he hath admitted and acknowledged, by his said bill, certain facts, which, by the known rules of the law, avoid his right to an answer]. [III.] Wherefore, and for divers other defects and causes of

demurrer appearing in the said complainant's said bill, this defendant doth demur thereto; and humbly demands the judgment of this honourable court, whether he shall be compelled to make any answer to the said bill; and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

The Plea of C. D. Defendant, to the Bill of Complaint of A. B. Complainant.

[I.] This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained, to be true, in such manner and form as the same are therein set forth, doth plead to the said bill; [II.] and for plea saith, that [there are certain incidents affecting the relation between the parties, omitted *(or sought to be invalidated)* in the said bill; but which, when stated *(or discharged from impeachment)* shew that this defendant ought not to be compelled to answer the said bill]; and this defendant avers [all necessary circumstances to avoid ambiguity, and exclude unfavourable construction.] [III.] All which matters and things this defendant doth aver to be true, and therefore he doth plead the same to the said bill as aforesaid, and humbly demands the judgment of this honourable court whether he shall be compelled to make any

further or other answer to the said bill; and prays to be hence dismissed with his reasonable costs, in this behalf most wrongfully sustained.

SECTION V.

Of the Commencement.

1. As to the commencement. We see that both pleas and demurrers begin with a protestation against confessing the facts, as stated in the bill, to be true. This is a form frequently used at common law, when the party pleading wishes to avoid the inference that he admits any thing which he has not an opportunity of putting in issue in that cause; and Lord Coke therefore defines it to be "the exclusion of a conclusion" (*j*). The use of the protestation at the commencement of the plea and demurrer in equity, is to save the defendant from being concluded by his implied admission of the truth of the facts stated in the bill; and is a kind of declaration *in limine*, that such facts are only admitted *for the sake of the argument*: for if subsequently his plea or demurrer should be overruled on argument, he is then to make a new defence, and may by answer deny or explain

(*j*) Co. Litt. 124, b.

away the statement, which the plea or demurrer had by implication allowed (*k*).

A *protestando* to the same effect is not necessary at common law, because there the plea in bar or demurrer, being an effective *litis contestatio*, is conclusive either way; and the plea in abatement, (on which, being overruled, the judgment is *respondent auster)* (*l*), does not bring into question the merits of the case, and, consequently, neither admits nor denies the facts stated in the declaration. But, as we have already seen, in equity, pleas and demurrers are more in the nature of objections to answer, and proceed upon the ground, that, *even granting that the complainant's statement be true*, still there is some reason, either *apparent*, or stated, in the plea, why he has not the right to discovery, or to the relief as prayed (*m*).

If the demurrer or plea be allowed, therefore, it is in effect the decision of the court, that the complainant has no right to discovery or relief, and consequently the bill is dismissed (*n*). In case, however, it be not a dismissal on the merits, such dismissal will not preclude the

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(*k*) Mitf. 14

(*l*) 2 Saund. 211. a. n. (3)

(*m*) *Ante*, p. 309, 315.

(*n*) 3 P. Wms. 95. Mitf. 175.

complainant from bringing a new bill, when the disability is removed, or informality rectified (*o*); and if this latter can be effected by amendment, the court might make a special order to that effect, without dismissing the bill (*p*). On the other hand, with respect to a plea, though the opinion of the court on argument should be favourable to the defendant, this does not terminate the proceeding; for, though the reasoning in law may be correct, the facts on which the rule of law is founded, may be untrue; to put which in issue, the complainant may reply, even after the plea has been allowed (*q*): and if at the hearing, it shall appear that the defendant has not proved his case, the plea is of no avail; and the defendant must answer interrogatories to supply the place of that discovery to which the complainant, but for the plea, would have been entitled by answer (*r*).

From the complex nature of a bill in equity, it is obvious, that the same defence may not be applicable to every part, but that it may be expedient to demur, or plead to one part of the bill, and answer to the rest; or to demur, plead, and answer, to different parts; and sometimes

(*o*) *Ibid.*

(*p*) Mitf. 13, n. (p) 175.

(*q*) Mitf 244 Beames Pleas. 317.

(*r*) 2 Ves. 247.

it may be necessary to have separate demurrers or separate pleas to distinct portions of the bill. Whenever, therefore, the demurrer or plea does not extend to the whole bill, it should clearly express what part of the bill it is intended to cover, and what it is the party refuses to answer (*s*); otherwise, the court would be put to great difficulty, and be obliged to refer to the bill and answer, to ascertain how far the pleading was meant to go; as, on the other hand, in case of a reference of the answer to a Master, upon exceptions, he would be at a loss to determine, precisely, whether the answer was sufficient or not (*t*). And it would not be enough, in such case, to say that the defendant answers to such and such facts, and pleads or demurs to all the rest of the bill; for a pleading of this sort would be overruled for being too general (*u*). It is in the commencement of the plea or demurrer, immediately after the protestation, that the statement is introduced of what part of the bill is sought to be covered by the pleading. The commencement in such case runs thus:—"This defendant, by protestation, &c. doth demur *(or plead)* to so much and such part of the

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(*s*) 2 Ves. 108. 450. 70. Mos. 40. 1 Ves. & Beames, 514.

(*t*) 2 Sch. & Lefr. 207.

(*u*) *Ibid.* and *vide* 3 Atk.

said bill as prays, &c. *(or seeks a discovery from the defendant, whether, &c.)* "

Great care, however, must be taken not to make the *demurrer* extend to any part of the bill to which it will not be a good defence; for *a demurrer cannot be good in part, and bad in part* (*v*); that is, if there be any part of the bill sought to be covered by the demurrer, to which the demurrer does not extend, the whole demurrer must be overruled (*w*); because the court will not be at the trouble of examining to which part of the bill the demurrer is applicable: yet the defendant is not thereby debarred of his defence, because he may afterwards, with the leave of the court, file a new demurrer of less extent (*x*). But if a defendant has demurred to part only of a bill, and answered other parts, it is no objection to the allowance of the demurrer that it is equally applicable to the whole of the bill (*y*). So, where there are separate demurrers to distinct parts of the bill; one demurrer may be overruled upon argument, and another allowed (*z*).

(*v*) 1 Atk. 451. 2 Atk. 388. 5 Ves. 173.

(*w*) 17 Ves. 280. 1 Swanst. 304.

(*x*) Mitf. 14. 11 Ves. 68.

(*y*) 1 Cox. 416.

(*z*) Mitf. 174. 3 P. Wms. 148. 1 Atk. 544.

But, with respect to pleas, the rule is different; for *a plea may be good in part, and bad in part* (*a*); or, in other words, if the plea cover too much, it will nevertheless be allowed to the *extent* to which it is applicable (*b*): and the reason that the rule with regard to demurrers does not extend to pleas, is, that the latter, being *special answers* to the bill, as we have seen by the definition formerly quoted (*c*); it may conveniently enough be ascertained to what part of the bill the plea is an answer, and whether any other part requires a further defence. Indeed, the usual course in such case is to allow the plea to stand for an answer, with liberty to except (*d*).

SECTION VI.

Of the Body, and herein of Averments and Intendments.

II. The body of the pleading consists of the assignment of the various causes of demurrer, or the statement of those facts which constitute the plea. A demurrer is the negation of the rule

(*a*) 4 Bro. C. C. 254. 8 Ves. 403. 11 Ves. 70.

(*b*) Mitf. 240. 2 Atk. 284.

(*c*) *Ante*, p. 238.

(*d*) 6 Ves. 580.

of law laid down in the first proposition of the bill, namely, that the right to discovery and relief results from the relation assumed; or rather, since the causes of demurrer must be assigned (*e*), it is a negative proposition, that *from the complainant's own shewing*, he has not the right to discovery and relief, either, *because* the relation stated by him is not adequate; or, *because* there are some of the objections to answering, which are classified in the *Synopsis*, apparent on the face of the bill. Thus, an issue in law is joined, not in the first instance on the complainant's right, but on the validity of the causes assigned; and if any of these causes be allowed on argument, the right is necessarily gone.

The statement of the causes of demurrer, therefore, will be nothing more than a reference to the bill, and an enumeration of the objections appearing on the face of it, on which the defendant means to rely. Hence arise two questions: whether the objection, as stated, really exists; and whether such objection is valid. The first is, generally, a question of the adequateness of the relation stated by the bill; the latter is a question on the rule of law: and the defendant should, in assigning the causes of demurrer,

(*e*) Beames' Ord. Chan. 77, 173.

clearly point out the nature of the objection which he takes, and how it appears on the adverse pleading.

It is a general rule, that a *speaking demurrer* is bad; *i. e.* when it contains argument in the body of it: if, for instance, the demurrer say, "in or about the year 1770, *which is upwards of twenty years before the bill filed* (*f*)". A demurrer, also, to any thing but what appears on the face of the bill, is considered as a *speaking demurrer* (*g*).

The defendant may shew as many causes of demurrer as there are objections apparent in the bill (*h*): in which respect a demurrer differs from a plea, which must not, (at least without the leave of the court) be *double* (*i*); and the reason of this difference is, that one of the principal advantages of a plea being to save the parties the expence of going into an examination at large, that end would be frustrated by permitting the defendant to put in issue a variety of facts, constituting distinct bars, any of which would have been sufficient; but demurrers put no facts in issue, and may therefore take every

(*f*) 2 Ves. jun. 83.
(*g*) 2 Ves. 245.
(*h*) 3 Mad. Rep. 8.
(*i*) 2 Eq. Abr. 176. 1 Atk. 54. 1 Bro. C. C. 404, and 2 Ves. & Beames, 153, 155.

available exception which can be used on the argument; and even causes of demurrer may be stated *ore tenus*, although not set out in the pleading (*j*); but, nevertheless, only to the extent of the demurrer on the record (*k*). For example: if the demurrer be to the discovery, the defendant cannot *ore tenus* demur to the examination of witnesses *de bene esse*; and much less shall he be allowed to demur at the bar, when he has only pleaded, and there is no demurrer in court (*l*).

As a demurrer collects the negative rule of law from the complainant's own statement, so the plea, on the other hand, deduces the same conclusion from a new statement by the defendant. The *body of the plea*, therefore, will consist of a statement of the facts from which the conclusion in objection to answering is drawn (*m*); and the defendant, in effect, makes out a collateral case, founded on some one of the modes of defence stated in the *Synopsis*.

The *collateral case* made by plea, may, like the statement of a bill, be resolved into two propositions; of which one states the rule of

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(*j*) 1 Vern. 78. 3 P. Wms. 370.

(*k*) 17 Ves. 213.

(*l*) 1 Vern. 78.

(*m*) 3 Atk. 558.

law, *viz.*—1st, *That certain incidents affecting the relation, avoid the complainant's right to discovery or relief:* the other avers the facts.—2nd, *That such incidents are attached to the relation in question.* Hence arise two questions: the first a question of law, as to the validity of the objection relied on; the other a question of fact, as to the truth of those allegations which constitute the objection. Upon either or both of these the complainant may take issue; and we have seen that if the plea on argument be determined against him, he may reply to the question of fact, and put the defendant on the proof (*n*); but if he replies in the first instance, without setting down the plea for argument, he thereby admits the validity of the rule of law, which is always the prior question; and he will not afterwards be admitted to dispute it, since he was contented to rest his case on the truth or falsehood of the facts alleged by the plea (*o*).

The statement of the facts, then, must be direct and positive, and such as will amount to a complete equitable bar, or other objection to answering (*p*). It must also be clear and precise, and contain such subsidiary *averments* as are necessary to avoid all ambiguity of mean-

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(*n*) *Ante,* p. 44, 335.
(*o*) 3 P. Wms. 95.
(*p*) Mitf. 240. 2 Ves. 245. 3 Atk. 586.

ing; for the rule of construction is always unfavourable to the pleader. '*Ambiguum, placitum interpretari debet contra proferentem*' (*q*). Hence, *averments* have been divided into *general* and *particular* (*r*). The first are those which state generally the collateral case; the latter are such as are used in explanation of the *general averments*, to exclude *intendments*(*s*) (as they are technically called), which, in all cases, are taken most strongly against the pleader. The meaning of an *intendment* is, that allowing an averment to be true, but that at the same time a case may be supposed consistent with it, which would render the averment inoperative as a full defence, such case shall be presumed, unless specifically excluded by particular averment;—as where a proposition in the disjunctive is not denied in both its parts; or a proposition in the conjunctive, affirmed in both its parts.

The *general averments* must contain a detailed statement, in their natural order, of all those circumstances, which, taken together, amount to a valid equitable defence (*t*); and if any of the links in the chain of facts be wanting, it will be intended against the defendant. It must be

(*q*) Co. Litt. 303. b.
(*r*) Co Litt. 362. b.
(*s*) Mitf. 240.
(*t*) 2 Ves. 243. 1 Bro. C. C. 578.

a statement of particular *facts*, and not of general deductions from facts (*u*): thus, it is not enough to say, that a thing was *duly* or *lawfully* done or executed, without setting out the particular manner; for that is a question for the court to determine, and not for the defendant to assume. This is meant, however, with regard to such averments only as go to the very substance and gist of the bar. To take a peculiar example:—the bankruptcy of the plaintiff, subsequent to the cause of action, is a good plea in bar, both in law and in equity (*v*). It is not, however, his being declared a bankrupt under the commission, which constitutes the bar; but his having *bonâ fide* committed an act of bankruptcy, and the proceedings thereon, including the transfer of his property to the assignees. For the substance of the bar, in this case, is the want of interest in the plaintiff, such interest being vested in his assignees; but if any of the previous steps be irregular, the assignment is void. It is not sufficient, therefore, to state, that the plaintiff was *duly* found and declared a bankrupt under the commission; but his being a trader under the act, his act of bankruptcy, and the several proceedings thereon *seriatim*, must

(*u*) 4 Bro. C. C. 321. 13 Ves. 29. 2 Sch. & Lefr. 101.

(*v*) 9 Ves. 77. 1 Anstr. 305—6.

be set out at full length: for although the commissioners may have declared him a bankrupt, *non constat*, but that their decision may be reversed; and that is for the court and jury to determine (*w*). So also, in pleading a release; the consideration must be set out (*x*), or otherwise it will be intended to have been made without a sufficient consideration; for the statement in the bill being taken for true, the demand is acknowledged to be just; and then a release would not be a good bar, unless the consideration were equivalent (*y*); but that is for the court to decide.

If any one of the *general averments* admits of an intendment unfavourable to the defendant, such intendment must be excluded by a *particular* averment. Thus, in outlawry or excommunication, which are pleaded *sub pede sigilli* (*z*), it must be averred, that they are still in force; and also that the person, named in the record produced to the court under seal, and the complainant, are one and the same person. This is similar to the usual averment of '*quæ est eadem*,'

(*w*) *Vide* what is said by Lord Eldon in Carleton *v.* Leighton, 3 Meriv. 667.

(*x*) Hard. 168. 2 Ves. 107. Gilb. For. Rom 57.

(*y*) See Lord Redesdale's judgment in Roche *v.* Morgell, 2 Sch. & Lefr. 728.

(*z*) Beames' Ord. Chan. 27.

in trespass at common law. In like manner, where the plea has been anticipated, and impeached by a charge in the bill, the charge must be negatived by a particular averment (*a*), to avoid the general intendment, that the allegations of the bill are true, and consequently the matter of the plea invalidated (*b*).

But, as we have explained in a former Chapter (*c*), a plea of this nature must be *supported* by an answer, so far as to deny the matter of impeachment charged in the bill (*d*); both for the technical reasons, which have been formerly detailed, and for another reason, which we shall mention here: namely, that notwithstanding the plea, the complainant is entitled to discovery, so far as relates to the charge, with all its circumstantial interrogations (*e*); and it is in its character of a proof, and not as a pleading, that the answer is used in this case. This is the meaning of the position, most correctly laid down by Lord Redesdale, when, in combating the notion, that there is something incongruous in this mode of pleading, he says, that "the

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(*a*) Mitf. 241, 196, *et seq.*

(*b*) Mitf. 241. Gilb. For. Rom. 58. 2 Atk. 241.

(*c*) *Ante*, Part 2, cap 1, sect 3.

(*d*) Mitf. 195, and the cases cited in the note.

(*e*) Gilb. For. Rom. 58. Mitf. 200. 6 Ves. 592.

answer is no part of the defence (*f*)". The plea alone is the defence: the answer is but the discovery, to which the complainant is entitled, and which the plea cannot cover; because the validity of the plea depends, in a great measure, on the discovery, to which alone the complainant can except; and the negative averment in the plea "does not require positive assertion (*g*)." Answers are thus used sometimes *in support* of a plea; but in other respects, if a defendant were to answer to parts of the bill, covered by plea or demurrer—these pleadings being, in fact, only objections to answering—would be thereby waived (*h*).

From the strictness of the rules regarding pleas, it is apparent, that in order to make the plea a full defence, all the averments must be stated positively (*i*); although in some instances —as in case of negative averments, and of averment of facts not within the immediate knowledge of the defendant, he will be permitted to aver according to the best of his knowledge and belief (*j*). A variety of facts may be averred,

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(*f*) *Vide* Mitf. 199, note (*h*). 2 Atk. 155. 1 Anstr. 14. and *vide* Beames' Pleas, 34. 1 Vern. 90.

(*g*) Mitf. 240.

(*h*) Gilb. For. Rom. 58.

(*i*) 3 Atk. 586.

(*j*) Mitf. 240.

provided they all tend to the same conclusion, and amount to a *single* objection (*k*); for, if more than one objection were taken, the plea would be bad for duplicity (*l*). By the common law, a double plea, or one which assigned more than one cause in bar of a suit, was bad (*m*); but now, by stat. 4th Ann, c. 16, two several bars may be pleaded, by the leave of the court, in any court of record. The court of equity not being a court of record, it was considered that a double plea in this court would be fatal: but it has lately been decided, that with the leave of the court, the defendant may plead double (*n*); and justly, since it would be contrary to all analogy, that the same latitude should not be allowed in equity, as at common law; and the previous sanction of the court sufficiently guards against abuse.

(*k*) 1 P. Wms. 723. 15 Ves. 79.

(*l*) 2 Eq. Ca. Abr. 176. 1 Atk 54. 1 Bro. C. C. 404. 2 Ves & Beames' 153.

(*m*) Co. Litt. 304, a.

(*n*) Gibson *v.* Whitehead, 30th July, 1819, before V.-C. Leach, cited in Madd. Chan. Prac. 299.

SECTION VII.

Of the Conclusion.

III. The conclusion of a plea or demurrer is, substantially, an appeal to the court, whether the defendant, for the reasons assigned in the body of the pleading, ought to be compelled to put in an answer, and contest the suit, or make that discovery which the complainant seeks by his bill: and it ends with a prayer, that the party may be dismissed from attendance, with his reasonable costs. The purport and design of pleas and demurrers of all descriptions in equity being to avoid an answer (*o*), the same conclusion is alike applicable to every species. In general, however, in pleas in bar, the defendant states, that he avers the matter contained in his plea, and pleads the same *in bar* (*p*): but this, though usual, is not necessary; nor will the want of it vitiate the plea (*q*).

At common law, every plea has its apt and proper conclusion (*r*), by which the nature of

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(*o*) Gilb. For. Rom. 58.

(*p*) Beames' Pleas, 49.

(*q*) This point was raised in the case of Merewether *v.* Mellish, 13 Ves. 435; but it was not even noticed by the court.

(*r*) Co. Litt. 303, b.

the plea is to be judged; and, therefore an improper conclusion would be fatal, there being an essential difference as to the judgment to be pronounced on each (*s*). The slightest informality will invalidate the plea in abatement (*t*); because the courts discountenance these pleas, which do not go to the merits: and it is but reasonable, that he that objects upon mere form, shall be judged by the same rule: besides, the judgment in such case is only interterlocutory, *quod respondeat ouster* (*u*). In equity, the decision of the court, with respect to all kinds of pleas and demurrers, is the same; *viz.* the bill is dismissed, or the defendant is put to *answer over*, and contest the suit. In this regard, all pleas, even such as are in bar in equity, are analogous to pleas in abatement at common law, which do not contest the suit. In equity, the answer is the only pleading which effectively contests the suit; and all pleas, whether dilatory or peremptory, are only objections to answering. Hence has arisen the doubt, whether there be any pleas in abatement in equity, as contradistinguished from pleas in bar (*v*); and certainly, it would be more correct to divide pleas in equity into declinatory, dila-

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(*s*) 1 Saund. 103, a. n. (1).

(*t*) 3 Term. Rep. 185. 8 Term Rep. 515.

(*u*) 2 Saund. 211, a. n. (3).

(*v*) *Vide* Beames' Pleas, 57, *et seq.*

tory, and peremptory, in analogy to the civil law, from which the proceedings in this court are derived. The judgment, in all pleas in equity, being the same, the conclusion need not be different; and, as we have seen, they bear an analogy to pleas in abatement at common law: so the conclusion is similar to that of pleas to the person at common law, where the defendant demands the judgment of the court *si respondere debet* (*w*). Thus, too, and with the same analogy, pleas of matter *in pais*, like pleas in abatement at common law (*x*), must be put in upon oath.

It has been questioned, whether a plea in equity, which did not conclude by averring the facts to be true (*y*), similar to the '*hoc paratus est verificare*' at common law, would be good; but since the stat. 4 Ann, c. 16, not even at common law can this objection (*z*) (nor the omission of '*prout patet per recordum*') be taken advantage of, but by special demurrer; and it would not, it is concluded, be available in equity.

When the plea or demurrer extends to part

(*w*) 2 Saund. 210, note. Tidd, 576.

(*x*) 2 Str. 705, 738.

(*y*) Randolph *v.* Randolph, Hardr. 160.

(*z*) 1 East, 369.

only of the bill, the conclusion must be conformable thereto; and as in that case there must be an answer to the rest of the bill, not covered by the plea or demurrer, such answer is preceded by a protestation against a waiver of the plea. So, likewise, when the answer is in support of the plea, it is expressed to be made for that purpose, and preceded by a similar protestation. This is, however, *ex abundanti cautelâ;* because an answer is only a waiver to the plea, "when it puts in issue any thing which the plea would cover from being put in issue (*a*)." Where an answer is added to a plea or demurrer, the prayer to be dismissed with costs is inserted at the end of the answer. In cases of this nature, the conclusion runs thus: 'this defendant doth plead (*or demur*) to so much of the said bill as is hereinbefore mentioned, and humbly demands the judgment of this honourable court, whether he shall be compelled to make any further or other answer, to so much of the said bill as is hereinbefore pleaded (*or demurred*) to. And this defendant, not waiving his said plea (*or demurrer*), but relying thereon for answer to the residue of the said bill, saith,' &c. If the answer be in support of the plea, 'this defendant not waiving his said plea, but relying thereon;

(*a*) Gilb. For. Rom. 58. Mitf. 195, n. (*e*).

and for better supporting the same, for answer to so much of the said bill as aforesaid, saith," &c.—The nature and form of answers will be the subject of our consideration in the ensuing Chapter.

CHAPTER V.

ANSWERS.

If the defendant cannot protect himself from discovery, by either plea or demurrer, he must give a distinct and full answer to each particular allegation and charge in the bill. The bill calls on the defendant "to make full, true, perfect, and distinct answers to all and singular the matters therein contained; and that as fully and particularly, as if they were repeated by way of interrogation:" and it then proceeds to interrogate to each point circumstantially. The defendant must therefore answer every part of the substance of the statement and charges, even though it should be omitted in the interrogation: and further, as the use of the interrogating part in the bill is to extract a full confession, and prevent evasion or ambiguity, every particular question must be answered precisely in all its bearings and circumstances, provided it be founded upon some express allegation in the body of the bill (*a*). So far as the answer is an admission of the facts charged by the complainant, it stands in place of proof in the cause; and

(*a*) 1 Bro. C. C. 503. 6 Ves. 37—8.

hence the great object which the complainant has in view, is to obtain such an answer as will either *supply* proof, where the facts rest within the knowledge of the defendant, and are binding in conscience only; or such as will *aid* proof; *viz.* where, although he shall be able to prove the facts by the testimony of others, yet the defendant's admissions will save him the trouble and expence of examining witnesses to those points which are acknowledged by the answer (*b*). Looked upon in this point of view, therefore, the answer must fully and fairly meet every enquiry in the bill; for if there be any possibility of evasion, the complainant will except. For this reason, the primary consideration with the draftsman, is to make the answer *sufficient;* and most of the observations we shall have to make, on the subject of answers, will relate to this point.

In earlier times, the forms of proceeding in this court do not appear to have been near so strict as they are at the present day, although perhaps they were abundantly sufficient for all purposes at that period, when the authority of the court of Chancery was yet in its infancy: and this looseness of form was certainly more conformable to the notion of equity then enter-

(*b*) 2 Atk. 241. 2 Ves. 492.

tained, being considered as a relaxation of the rule of law. Thus the answer seems to have been little more than a general and informal statement of the adverse case, in reply to the bill, accompanied with a traverse of all such points as the defendant thought it material to deny, in order to put the complainant upon the proof; and concluding with a general traverse of whatever was not admitted to be true. This general traverse at the end of the answer, though now unnecessary, as every point must be answered separately, is still continued in practice (*c*). In like manner, the defendant was permitted to answer and plead, or demur, at the same time, and to the same parts of the bill; because the answer, being such as we have described it above, was not considered so much in the light of a discovery, which the defendant, by his plea or demurrer would avoid, as of a pleading to be used only on the defence. Hence it was usual to commence the answer with a general reservation of the right to except to the complainant's bill; and although, since the practice of the court has been matured, the answer would be a waiver of a plea or demurrer (*d*), and consequently no objection can be taken

(*c*) 2 P. Wms. 87.

(*d*) Mitf. 258. 3 Anst. 715. 2 Atk. 155.

after answer to the bill (*e*), still the old form of commencement is adhered to. The commencement is now, therefore, a mere technical form, of no further utility than as it serves to characterize the pleading. In the case of an infant, whose rights and interests are under the peculiar protection of the court, this form of reserving the benefit of exceptions, as well as the usual denial of combination, at the close of the answer, are omitted (*f*).

The defendant, by his oath, is bound to answer according to the best and utmost of his knowledge, remembrance, information, and belief. That which he is acquainted with of his own knowledge, admits of a direct answer, either in the affirmative or negative, unless it be a matter of recollection, in which respect the answer must be qualified according to the extent of the remembrance. Such circumstances as are known to the defendant from information and hearsay only, are the proper subjects of belief, and on which he in general has formed some opinion, either of assent or dissent. It is not enough, therefore, to answer the question,

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(*e*) But if, after an answer, the complainant amends his bill, the defendant may, notwithstanding his former answer, put in a plea to the amended bill. *Vide* Ritchie v. Aylwin, 15 Ves. 79.

(*f*) Mitf. 254.

by saying he has been informed, or heard of any particular fact; but he must state whether or not he believes it to be true (*g*). Again, there may be other facts alleged in the bill, to which the defendant is a total stranger, and of the truth of which he cannot form any opinion. Thus, the answer will be either a direct admission or denial; or an assent or dissent; or a declaration, that the defendant cannot, as to his belief, or otherwise, form any opinion of the truth or falsehood of the facts alleged.

But there may be statements or charges in the bill, which though true in part, are yet substantially incorrect; and which, therefore, it may be necessary to add to, qualify, or explain. To questions of this nature the defendant cannot give a direct answer in the first instance; but he must state the case according to the fact, and conclude by denying that the particular statement or charge is true, 'further or otherwise' than as he has explained it (*h*). This is the meaning of a *traverse* in an answer, so frequently to be met with in the books as contradistinguished from a direct denial; and although it is not now marked by the technical words *absque hoc*, it is, to all intents

(*g*) Hinde, 197.

(*h*) This bears some analogy to the '*sophismu plurium interrogationum*' of the logicians, where inconsistent points are involved in one

and purposes, a *traverse*, being preceded by an inducement of matter inconsistent with the statement of the complainant, but which, without the denial in the conclusion, would not tender an issue; and this, we have seen, is the definition of a traverse, as explained in a former chapter (*i*).

It is an observation worthy of the student's attention, that in order to make an answer sufficient, and thereby avoid exceptions, the words of the interrogation ought, as nearly as possible, to be followed, but so as that the charge may not be answered literally, but in substance. Thus it should be said 'this defendant admits or denies it to be true;' or, 'has been informed and believes it to be true, that,' &c.; following the words of the bill in the interrogating part. So, likewise, when the defendant disclaims all knowledge, he should say, 'and this defendant doth not know, and cannot as to his belief or otherwise, save as he is informed thereof by the said bill, answer or set forth whether,' &c. repeating the interrogatory. The traverse is in this form: 'this defendant further answering, saith that,' &c. (stating his case) 'and this defendant further, or otherwise

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question, *ex. gr. suffine mel et fel dulcia? Evitantur insidiæ,* *ad singulas quæstiones seorsum respondendo.*

(*i*) *Vide ante,* Part 2, c. 1.

than as aforesaid, denies it to be true that,' &c. (the words of the interrogatory). If the defendant be interrogated to a point of law merely, and not of fact, instead of answering, he submits the question to the decision of the court; 'and this defendant submits it to this honourable court, whether,' &c. We have already seen, that many circumstances which would have been available, as a defence by way of plea, may be insisted upon by answer; as where the defendant does not require to protect himself from discovery (*j*); or where it might be doubtful whether the same defence would hold as a plea (*k*); or where, from the variety of matters to be put in issue, a plea would not atchieve the object of shortening the suit and saving expence (*l*). In this respect the answer confesses and avoids the particular allegation of the bill, similarly to what we have described when treating of pleas; 'and this defendant admits it to be true, that, &c.; but then he saith that,' &c. (stating the matter in objection); and it is a common, but unnecessary practice, to conclude with insisting upon having the same benefit of the objection so stated, as if the same were pleaded in bar to the relief, or *demurred* to as to the *discovery*, where it would cause a penalty

(*j*) Mitf. 249.
(*k*) 2 P. Wms. 145.
(*l*) 1 Atk. 54.

or forfeiture; or a breach of confidence in a counsel, attorney, or arbitrator (*m*). These are the only cases, as we have stated in the preceding chapter, in which the defendant can insist by answer against making a discovery: in all other cases, where the defendant submits to answer, although he might have good ground for pleading or demurring, *he must answer fully* (*n*).

It was formerly thought, that if a defendant denied by his answer the foundation of the bill, as where he denied the complainant's title, or where such title had not been previously established at law; he might decline making any discovery as to those enquiries in the bill which rested on the assumption of the matter denied (*o*), as of good title for instance; unless such discovery were material as affecting the controverted point. This had been long a *multum vexata quæstio*, and one which Lord Eldon termed a 'distracted point' (*p*); for the cases abound with contradictions, and nice and subtle distinctions upon the subject (*q*). But the question is now put completely at rest, it hav-

(*m*) *Ante*, p. 324.
(*n*) 3 Madd. Rep. 70
(*o*) Mitf. 251—2—3.
(*p*) Shaw *v.* Ching, 11 Ves. 306.
(*q*) 2 Madd. Chan. Prac. 338—9.

ing been recently decided "that a defendant cannot by answer object to answering, though by plea he may (r); and Sir John Leach, expressing his opinion on this point, said, "I think that this is so useful a rule, I shall always adhere to it." The allowing a contrary rule to prevail, would be to confound all just distinctions, and to do away all the advantages that result from adhering to systematic forms.

The old practice seems to have obtained from having allowed too great a latitude of construction to a different rule; namely, that where there is a series of questions depending upon a supposition of the fact upon which they are built being admitted; if that fact be denied, it would be undoubtedly superfluous to go on and give a particular negative to each query deduced from such presumed fact. But this rule relates to a single allegation and its consequents, and not to a point which, if insisted on by a negative plea, would be a good objection to the discovery of independent matter; and the reason of this rule is, that the answer may not be rendered needlessly prolix by the insertion of that which is sufficiently denied by the previous answer.

For the similar purpose of avoiding prolixity,

(r) Mazzaredo v. Maitland, 3 Madd. Rep. 70.

deeds or other writings should not ordinarily be set out *in hæc verba*, even though called for by the bill (*s*). It is sufficient if they are referred to, and left with the clerk in court, for the complainant to take copies, if he thinks proper; or the court will order them to be produced on the examination of witnesses (*t*). In all other respects, however, the answer to each enquiry must be full and precise; and although general accounts, and inventories, and such like, may be set out in schedules annexed to the answer, and which the defendant prays may be taken as part thereof, yet any particular question relating to such account, &c., must be answered specifically; and it will not be enough to refer generally to the schedule, in answer to such particular query (*u*). Most of the rules relating to the precision of answers are to be found in the following extract from Lord Clarendon's orders (*v*). "An answer to a matter charged as a defendant's own fact, must regularly be without saying 'to his remembrance,' or, 'as he believeth,' if it be laid to be done within seven years before; unless the court, upon exception taken, shall find special cause to dispense with so positive an answer: and if the defendant deny the

(*s*) Hinde, 198. Beames' Ord. Chan. 69, 166.

(*t*) Hinde, 198.

(*u*) 1 Bro. C. C. 503.

(*v*) Beames' Ord. Chan. 179.

fact, he must traverse or deny it (as the cause requires) directly, and not by way of negative pregnant (*w*). As, if he be charged with a receipt of a sum of money, he must deny or traverse that he hath not received that sum, or any part thereof, or else set forth what part he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point of substance positively and certainly."

An answer must not, no more than a plea or demurrer, be argumentative (*x*); but should rely on matter of fact only. There is one more observation, which the student will do well to recollect; namely, that when any admission which might operate against the defendant, is followed by an avoidance or explanation, this should be one continuous sentence; for though the answer, when replied to, cannot be read at the hearing in support of the defendant's case, yet if part of any sentence be read by the com-

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(*w*) "A *negative pregnant* is a negative, implying also an affirmative; as if a man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo et formâ declaratâ*; which implieth, nevertheless, that in some sort he did it." Cowell. Beames' Ord. Chan. 179, n. (56).

(*x*) 11 Ves. 303.

plainant, the defendant will be entitled to have the whole of that sentence read; and, in like manner, when a sentence has a direct reference to a previous part of the answer, the defendant has a right to read the part referred to.

In order to give the student a general idea of the form of an answer, we shall here insert an answer to the skeleton bill given in a former chapter; and, as far as it may be done, with its several variations.

"The Answer of C. D. Defendant,
to the Bill of Complaint of
A. B. Complainant.

"This defendant saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says he believes it to be true, that at the time in the said bill in that behalf mentioned, such events did take place as led to the relation now existing between the said complainant, A. B., and this defendant: and he admits it to be true, that such relation does in fact exist. And this defendant, further answering, saith, he admits it

to be true, that the said complainant and this defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant: but then, he saith, such equitable incidents depend upon the performance of a condition precedent; and that such condition has never been performed by the said complainant, although this defendant hath always been ready and willing, and hereby offers to perform his part of the contract, whenever the said complainant shall have complied with the terms thereof on his part. And this defendant further answering saith, that had the said complainant performed the said condition precedent, such duties as are in the said bill in that behalf set forth to be performed by this defendant, would have arisen from the said relation; but further or otherwise than as aforesaid, this defendant denies it to be true, that such duties as are in the said bill set forth to be performed by this defendant, did arise from the said relation. And this defendant denies it to be true, that the said complainant hath, by himself or his agents, or in any other manner, made such or the like applications and requests as are in the said bill in that behalf mentioned, or any applications and requests in respect of the matters in the said bill mentioned. And this defendant doth not know, nor can he as to his belief or otherwise, save as he is informed thereof by the

said bill, set forth whether the circumstances in the said bill charged are true, or how otherwise. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged: *without this*, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained (material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied,) is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honourable court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

It can be scarcely necessary to observe, that the above general form is given merely for the example; and that answers cannot pursue any precise method or arrangement, but must follow the circumstances of the case, and the allegations of the bill. For further answers, and the answers to amended bills, which are always considered as a continuation and part of the former answer, we refer the student to the Appendix. We have endeavoured to mould the above form,

so as to give instances of—1, an assent; 2, admission; 3, confession and avoidance; 4, traverse; 5, denial; and, 6, disclaimer of knowledge. The example of denial affords us also an apt illustration of the rule, that it is useless to deny a fact, the negation of which is necessarily involved in the answer to a former question. Thus, as the defendant denies that any requests were made to him, it would be utter trifling to say that he did not refuse to comply with them, or why.

The conclusion, which is a common form, and now quite unnecessary, supplies us with an example of the formal traverse, with an *absque hoc*. This is a general traverse of every allegation in the bill, which the answer did not specifically meet; but formerly it was the custom to insert, immediately preceding the general traverse, a particular traverse of those parts of the bill which the defendant meant to deny; the whole foregoing part of the answer being nothing but inducement, or a statement of the defendant's case, inconsistent with that made by the bill (*y*).

(*y*) The student will find in the Appendix the precedent of a bill, and an answer to it in the old form, taken from the Cursus Cancellariæ, p. 125, *et seq.*

As an infant is not bound by the answer put in for him by his guardian, and as the Attorney General cannot be compelled to answer at all (*z*), such answers cannot be excepted to (*a*); and they are, therefore, seldom full. For the form of those answers, as well as for *disclaimers*, which are a species of answer, filed by persons made defendants, who claim no interest or concern in the suit, we must refer the student to the Appendix.

(*z*) Dick. 730.

(*a*) Madd. Cha. Prac. 336, and the case cited in the note. Mitf. 254.

CHAPTER VI.

THE REPLICATION.

When the answer, according to the practice which formerly prevailed, was only a statement of the defendant's case, in reply to the bill, and not, as at the present day, a full discovery of all the matters charged, it usually became necessary for the complainant to make a special replication to such statement in the answer, which was followed by a special rejoinder, rebutter, and so on, until a distinct issue was joined, as at common law. But, as the practice now stands, the answer being a full discovery to every point, the complainant may find sufficient admissions in the answer, upon which to ground a decree; whereupon he proceeds to a hearing, upon bill and answer only. If the admissions be accompanied by a statement in avoidance, the complainant will be allowed, instead of replying specially to the new matter, to amend his bill, and extract fresh discovery. The amended bill, therefore, and further answer, supply the place of special

pleadings, which are now obsolete; and the reason why this practice has obtained in equity, though not at common law, is, that the great object of *special* pleading at common law, is to keep the law and the fact distinct, they being to be tried by separate tribunals; but in equity the whole question comes before the court for it's decision, both on the pleadings and the proofs.

When the defendant, by his answer, denies the material facts of the bill, an issue is then *tendered* upon them; and the complainant must *join* issue, and prove the facts thus disputed, by the testimony of two witnesses at least, against the positive oath of the defendant (*a*). Such issue is joined by a general replication, that the complainant *will aver, and prove his bill to be true, certain, and sufficient*; which is an issue, both as to the law and the facts, according to the constitution of the court. When the answer advances a new statement on behalf of the defendant, the complainant should *tender* an issue to the new facts, and oblige the defendant to prove them; as otherwise, they will be taken to be true. This also is done by the general replication, stating, *that the answer of the defendant*

(*a*) 2 Chan. Ca. 8. 1 Vern 161 3 Atk 270, 649.

is uncertain, untrue, and insufficient, which *tenders* an issue, both of law and fact, on which the defendant *joins* issue by a formal rejoinder,—a pleading which is supposed to be filed, but is never actually drawn; the practice being to serve the defendant with a *subpœna ad rejungendum* (unless he submits to rejoin *gratis*), which is equivalent to a notice of replication; and issue is then joined between the parties (*b*). Hence we find that the replication in equity only serves as a mere form for producing an issue; and as such, it need not be signed by counsel (*c*). The form of it is as follows:—

The Replication of A. B. complainant,
to the Answer of C. D., defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant: *without this*, that any other matter or thing whatsoever, in the said answer con-

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(*b*) *Vide ante*, p 105. (*c*) Hinde, 285. Mos. 123, 296.

tained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is, and will be, ready to aver and prove, as this Honourable Court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

The general replication concludes the pleadings in equity.

THE END.

APPENDIX.

BILLS (ADDRESS OF).

1. *In Chancery.*

To the Right Honourable the Earl of Eldon, Lord High Chancellor of Great Britain.

Humbly complaining, &c. . . . . Lordship.

2. *When the Seals are in Commission.*

To the Right Honourable A. B., C. D., and E. F., Lords Commissioners for the custody of the Great Seal of Great Britain.

Humbly, &c. . . . . Lordships.

3. *In the Exchequer.*

To the Right Honourable Frederick Robinson, Chancellor and Under Treasurer of his Majesty's Court of Exchequer at Westminster; the Right Honourable Sir Richard Richards, Knight, Lord Chief Baron of the same Court; and the rest of the Barons there.

Humbly, &c. . . . . Honours.

4. *In the Chancery of Lancaster.*

To the Right Honourable Charles Earl of Liverpool, Chancellor of the Duchy of Lancaster, and one of his Majesty's most Honourable Privy Council.

Humbly, &c. . . . . Lordship.

5. *In the Great Sessions of Wales.*

To the honourable A. B. and C. D. Esqrs., his Majesty's Justices of the Great Sessions for the several Counties of Glamorgan, Brecon, and Radnor.

Humbly, &c. . . . . Lordships.

6. *In the Lord Mayor's Court.*

To the Right Honourable A. B., Lord Mayor of the City of London, and the Worshipful his Brethren, the Aldermen, of the same City.

Humbly, &c. . . . . Lordship and Worships.

COMMENCEMENT.

1. *In Chancery.*

Humbly complaining, sheweth unto your Lordship your orator A. B. of (*place of abode and addition*) that, &c. &c.

2. *In the Exchequer.*

Humbly complaining, sheweth unto your *Honours* your orator, A. B., of, &c., debtor and accountant to his Majesty, as by the records of this honourable court, and otherwise it doth or may appear, that, &c.

3. *By a Peer.*

Complaining, sheweth unto your Lordship, your orator the Right Honourable A. Earl of B. (*or as the case may be*), that, &c.

4. *By a Body Corporate.*

Humbly complaining, shew unto your Lordship, your orators the mayor, bailiffs, and commonalty of the city of A., that, &c.

5. *By Creditors, Legatees, &c. on behalf of themselves and other Creditors, &c.*

Humbly complaining, shew unto your Lordship, your orators and oratrixes, A. B., of, &c., C. D., of, &c., E. F., of, &c., spinster, G. H., of, &c., on behalf of themselves and all other the bond and simple contract creditors (*or legatees, or next of kin*) of I. J., late of, &c., deceased, who shall come in and contribute to the expenses of this suit, that, &c. &c.

6. *By an Infant.*

Humbly complaining, sheweth unto your Lordship, your orator, A. B., an infant under the age of 21 years, that is to say, of the age of years, or thereabouts, by C. D., of, &c., his (*relation*) and next friend, that, &c.

7. *By a Feme Covert.*

Humbly complaining, shew unto your Lordship, your orator and oratrix, A. B., of, &c. and C. his wife, that, &c.

8. *By a Feme Covert, claiming in opposition to her Husband.*

Humbly complaining, sheweth unto your Lordship your oratrix, C. the wife of A. B., of, &c., by D. E., her next friend, that, &c.

9. *By a Feme Covert whose Husband is an Exile, &c.*

Humbly complaining, sheweth unto your Lordship, your oratrix, A. B., of, &c. the wife of C. B., late of, &c., who hath by due course of law been sentenced to transportation to parts beyond the sea, where he now is (*or who hath abjured the realm, or who is an alien enemy*), that, &c.

10. *By a Lunatic.*

Humbly complaining, shew unto your Lordship, your orators, A. B., of, &c., and C. D., late of, &c., but now of, &c., against whom a commission of lunacy has lately been awarded and issued, and is now in force; and under which commission the said C. D. was duly found and declared to be a lunatic, and your orator, A. B., appointed committee of his estates: that, &c.

11. *Information on behalf of the Crown.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of his Majesty, that, &c.

12. *Information on behalf of those who partake of the Prerogative.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of

his Majesty, aud the masters, fellows, and scholars of Trinity College, Cambridge, (*or as the case may be*) that, &c.

13. *Information with a Relator.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D., clerk, vicar of the parish of E., and F. G. and H. J., churchwardens of the same parish, for and on behalf of themselves and the rest of the parishioners of the said parish, (*or as the case may be*) that, &c. &c.

14. *Information and Bill.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D. and E. F., of, &c., and humbly complaining shew unto your Lordship, the said C. D. and E. F., that, &c. (*statement*). And his Majesty's Attorney General, by the relation aforesaid, informeth; and your orators further shew unto your Lordship, that, &c.

15. *Information on behalf of a Lunatic.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of C. D., a lunatic, at and by the relation of E. F., of &c., that, &c. &c.

16. *Information for the Queen.*

Informing, sheweth unto your Lordship, A. B., Esq. Attorney General of her Majesty the Queen Consort, that, &c. &c.

Statement of Requests and Charge of Confederacy.

And your orator hath accordingly, both by himself and his agents, frequently and in a friendly manner applied to and requested the said C. D. and E. F., (*the defendants*) to, &c.; and your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been. But now so it is, may it please your Lordship, the said C. D. and E. F., combining and confederating with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays he may be at liberty to insert in this his bill, with apt and proper words to charge them as parties defendants hereto, and contriving how to injure and oppress your orator in the premises, the said C. D. and E. F., absolutely refuse to comply with your orator's aforesaid reasonable requests; and to countenance such their unjust conduct, they sometimes pretend that (*pretences and charges*). All which actings, pretences, and refusals of the said confederates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

Clause of Equity, and Commencement of the Interrogating Part.

In consideration whereof, and forasmuch as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable; to the end that the said C. D and E. F., and their confederates, when discovered,

may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and distinct answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively, distinctly interrogated; and more especially that the said defendants, C. D. and E. F., may, in manner aforesaid, answer and set forth whether, &c.

SPECIAL ENQUIRIES.

1. *As to Applications and Requests.*

And whether your orator hath not by himself or his agents, or how otherwise, made such applications and requests to the said defendants, as are hereinbefore in that behalf mentioned, or some such or the like, or any, and what other applications and requests in respect of the several matters aforesaid, and whether the said defendants have not refused to comply therewith, and why?

2. *As to a Deed set forth in the Bill.*

Whether such indenture, bearing date on or about the day of , as hereinbefore particularly mentioned, was not made between such parties as hereinbefore set forth, or some, and which of them, and was not of such purport as hereinbefore stated; or whether some indenture of some and what date was not made between some and which of the said

parties, and was not of some such or the like purport or effect, or how otherwise.

3. *For an Account of Money had and received.*

And that the said defendants may set forth an account of all and every sum and sums of money received by them or either of them, or by any person or persons by their or either of their order, or for their or either of their use, for or in respect of the said (*as the case may be*), and when and from whom, and for what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

4. *For an Account of the Rents and Profits of a Testator's Real Estate.*

And that the said defendants may set forth a full, true, and just rental and particular of the real estates, whereof or whereto the said testator was seised or entitled in fee simple, at the time of his death; and also a full, true, and particular account of all and every sum and sums of money, which hath or have been received by them, or either of them, or any other person or persons by their or either of their order, or for their or either of their use, for or in respect of the rents and profits of the said estates, or any part thereof; and whether any, and which of the said estates, or any part or parts thereof, have or hath been sold or disposed of, and at what price or prices respectively, and when and to whom; and whether such price or prices respectively have or hath been paid, and to whom; and if not, why not.

5. *For an Account of Personals.*

And that the said defendants may discover and set forth a full, true, and particular account of all and singular the personal estate and effects of the said testator, and of every part thereof, which hath been possessed by, or come to the hands of the said defendants, or either of them, or to the hands of any other person or persons, by their or either of their order, or for their or either of their use; with the particular nature, quantities, qualities, and true and utmost values thereof, and of every part thereof respectively; and how the same, and every part thereof, hath been applied and disposed of; and whether any, and what part thereof, now remains unapplied and undisposed of; and why; and whether any, and what part of such personal estate remains outstanding, to any, and what amount, and why; and that the said defendants may also set forth an account of the debts due from the said testator, and of his funeral expences and legacies; and whether any, and which of such debts are outstanding; and why.

6. *For the Production of Deeds and Papers.*

And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing, relating to the matters aforesaid, or any of them; or wherein or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may particularly describe which thereof now are in their, or either, and which of their possession or power,

and may deposit the same in the hands of their clerk or clerks in court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

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1. *Prayer for General Relief.*

And that your orator may have such further and other relief in the premises, as to your Lordships shall seem meet, and the nature and justice of the case may require, may it please, &c.

2. *Prayer of Bill of Revivor.*

To the end therefore that the said suit and proceedings therein may stand revived against the said C. D. and be restored to the same plight and condition as the same were in at the time of (*abatement*), or that the said C. D. may shew good cause to the contrary, may it please, &c.

3. *Conclusion of Prayer in a Bill of Discovery.*

And that your orator may have a full disclosure and discovery of all and every the matters and things aforesaid, may it please, &c.

4. *Prayer of a Bill to perpetuate Testimony.*

And that your orator may be at liberty to have his witnesses examined to the several matters and things hereinbefore mentioned, so that the testimony of the said witnesses may be preserved and perpetuated; and

that your orator may be at liberty, on all future occasions, to read and make use of the same, as he shall be advised, may it please, &c.

Clause of Equity in the same.

In consideration whereof, and forasmuch as your orator cannot have the said witnesses examined, in order to perpetuate their testimony, without the aid of a court of equity, to the end, &c.

5. *Prayer of Bill of Interpleader.*

And that the said C. D. and E. F. may be decreed to interplead and adjust their said several claims and demands between themselves, your orator being willing and desirous that the said (*demand*) should be paid to such of the said defendants as shall appear to be entitled thereto; and your orator doth hereby offer to pay the same into the hands of the accountant-general of this honourable court, to be disposed of as this honourable court shall direct (*if injunction*)——

6. *Prayer for an Injunction.*

And that in the mean time, the said C. D. and E. F., their counsel, solicitors, agents, and attornies, may be restrained, by the order and injunction of this honourable court, from prosecuting or commencing any action or actions at law against your orator, for or in respect of the several matters aforesaid; and that your orator, &c. (*general relief*).

Clause of Equity, in a Bill of Interpleader.

In consideration whereof, and forasmuch as your

orator is remediless in the premises, without the aid of a court of equity, where the said several claimants may interplead and settle and adjust their several rights and demands between themselves, so that your orator may be enabled to pay the said (*demand*) with safety, to the end, &c.

7. *Conclusion of Certiorari Bill.*

In consideration whereof, and forasmuch as for want of jurisdiction in the said (*court below*), your orator is remediless there; and your orator is advised, that he is entitled to have a writ of *certiorari* issued from this honourable court, and directed to (*court below*), commanding him to certify and remove the said bill, and all proceedings thereon, unto this honourable court; may it therefore please, &c.

8. *Prayer of Bill of Review.*

And that for the reasons aforesaid, the said cause and decree therein pronounced, may be reviewed by this honourable court, and that the said decree may be reversed for error apparent therein, and no further proceedings taken thereon; may it please, &c.

DEMURRERS, PLEAS, AND ANSWERS.

(*Title of*).

The Answer (*or plea, or demurrer*) of C. D. the defendant (*or one of the defendants,*) to the bill of complaint of A. B. complainant.

Joint and several Answer.

The joint and several Answer of C. D. and E. F. the defendants (*or two of the defendants*) to the bill of complaint of A. B. complainant.

Infant's Answer.

The Answer of C. D., an infant under the age of twenty-one years, by E. F. his guardian, one of the defendants to the bill of complaint of A. B., complainant.

---

1. *Commencement and Conclusion of an Answer.*

This defendant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says, &c. . . . (*conclude*) And this defendant denies all and all manner, &c.

2. *Joint Answer.*

These defendants, &c. (*as before*) each answering for himself (*and herself*), and not the one for the other, jointly and severally answer and say, &c.; and these defendants deny all, &c.

3. *Infant's Answer.*

This defendant, answering by his said guardian,

saith, that he is an infant of the age of years, or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause, to the protection of this honourable court; without this, that, &c.

4. *Title of further Answer, and of Answer to Amended Bill.*

The further Answer of C. D., defendant to the (*original*) bill, (*and his answer to the amended bill*) of complaint of A. B., complainant.

This defendant, saving and reserving to himself the same benefit of exception to the said (*original*) (*and amended*) bill, as by his former answer to the said (*original*) bill is saved and reserved, for answer thereto, &c.; (*conclude*); without this, that, &c.

5. *Answer and Disclaimer.*

The Answer and Disclaimer of C. D. one of the defendants to the bill of complaint of A. B. complainant.

This defendant, &c.; (*conclude.*) And this defendant saith, that he never had, or claimed, or pretended to have, nor has he now, nor does he claim, or pretend to have any right, title, or interest of, in, or to the said (*matter in question*), or any part thereof; and this defendant disclaims all right and title of, in, or to the same, and every part thereof; and this defendant denies, &c.

6. *The Answer of a formal Party, who is a Stranger to the Facts charged*

This defendant, saving and reserving to himself, &c.

answers and says, that he is a stranger to all and singular the matters and things in the said complainant's bill of complaint contained, and therefore leaves the complainant to make such proof thereof as he shall be able to produce; without this, that, &c.

N. B. This is the usual answer of the Attorney-General.

7. *Conclusion of an Answer, claiming the same Benefit of Defence as if the Bill had been demurred to for want of Equity.*

And this defendant submits to this honourable court, that all and every of the matters in the said complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit of this defence, as if he had demurred to the said complainant's bill; and this defendant denies, &c.

Commencement and Conclusion of a Demurrer.

1. *To the whole Bill.*

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto; and for cause of demurrer sheweth, that, &c.; (*conclude*). Wherefore, and for divers other causes of demurrer, appearing in the said bill, this defendant humbly demands the judgment of

this honourable court, whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his reasonable costs, in this behalf most wrongfully sustained.

2. *Demurrer to Part of the Bill, and Answer to the Residue.*

This defendant, by protestation, &c. as to so much of the said bill as seeks (*parts demurred to*), doth demur; and for cause of demurrer sheweth, that, &c.; (*conclude,*) Wherefore, and for divers other causes of demurrer, appearing in the said bill, this defendant humbly demands the judgment of this honourable court, whether he shall be compelled to make any further answer unto such part of the said bill as is so demurred unto as aforesaid: and as to the residue of the said bill, this defendant not waiving his said demurrer, but relying thereon, and saving and reserving to himself, &c. (*as before, vide answer.*)

3. *Commencement and Conclusion of a Plea.*

This defendant, by protestation, &c. (*as in demurrer*) doth plead thereto, and for plea saith, &c. (*conclude*). All which matters and things this defendant doth aver to be true, and is ready to prove, as this honourable court shall direct. Wherefore he doth plead the same (*in bar, or as the case may be*) to the said bill, and humbly demands the judgment, &c. (*as in demurrer*).

4. *Plea to Part, and Answer to Residue of Bill.*

(*Is the same as Demurrer and Answer, mutatis mutandis.*)

EXCEPTIONS.

1. *To an Answer.*

Between A. B. - - - - Complainant,
and C. D. - - - - Defendant.

Exceptions taken by the said complainant to the answer put in by the said defendant C.D., to the said complainant's bill of complaint.

1st. For that the said defendant, C. D. has not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether (*the interrogatory verbatim as in the bill*).

2nd. For that the said defendant hath not in manner aforesaid answered and set forth whether, &c.

In all which particulars the said answer of the said defendant C. D. is, as the said complainant is advised, imperfect, insufficient, and evasive; and the said complainant therefore excepts thereto, and prays that the said defendant C. D, may put in a further and better answer to the said bill of complaint.

2. *Exceptions to Master's Report.*

In Chancery.

Between { A. B. Complainant, and C. D. Defendant.

Exceptions taken by the said complainant to the report of E. F., Esq., one of the Masters of this honourable court, to whom this cause stands referred, bearing date the day of

First exception:—For that the said master has, in and by his said report, certified, &c. (*as the case may be.*) Whereas the said Master ought to have certified that, &c.

Second exception :—For that the said master hath certified, &c.

In all which particulars, the report of the said Master is, as the said defendant is advised, erroneous; and the said defendant appeals therefrom to the judgment of this honourable court.

INTERROGATORIES.

For the Examination of Witnesses.

In Chancery.

Between A. B. - - - - Complainant,
and C. D. and E. F. - Defendants.

Interrogatories, to be exhibited to witnesses, to be produced, sworn, and examined in this cause, now depending and at issue in this honourable court.

On the part of the said complainant—

1st, Do you know the parties, complainant and defendant, in the title of these interrogatories named, or any, and which of them, and how long have you known them, or any and which of them respectively. Declare the truth of the several matters by this interrogatory inquired after, according to the best of your knowledge, remembrance, and belief, with your reasons at large.

2nd Interrogatory. Whether or no, &c. (*as the case may be*); declare, &c.

Lastly. Do you know, or can you set forth, any other matter or thing, which may in anywise tend to the benefit or advantage of the complainant in this cause? If yea, set forth the same, and all the circumstances and particulars thereof, as if you had been interrogated thereto, according to the best of your knowledge, remembrance, and belief, with the reasons for such your belief, fully and at large.

Interrogatories before the Master (Title of).

In Chancery.

Between A. B. and C. D. Complainants;
and E. F. and G. H. Defendants.

Interrogatories, to be exhibited before I. J., Esq. one of the Masters of this honourable court, for the examination of (*as the case may be*), pursuant to an order made in this cause (*or as the case may be*), bearing date the day of , in the year

First Interrogatory, &c. &c. &c.

* PRECEDENT OF A BILL AND ANSWER.

(From the Cursus Cancellariæ.)

A Bill to cause one to shew his Writings, whereby he holds his Lands, &c.

Humbly complaining, W. B. sheweth, &c. That *whereas* about four years last past, one T. L. of, &c., upon a certain judgment in a plea of debt, amounting to the sum of, &c., or thereabouts, by him obtained in her Majesty's court of common pleas, against one G. L. of M., in the county of, &c. sued forth her Majesty's writ of *fieri facias*, directed to the sheriff of the said county, for the levying of the said debt of the goods and chattels of the said G. L. By virtue of which writ the said sheriff did, amongst other things, take into his hands one lease for divers years yet to come, made to the said G. L. by one T. S. in the county of D. Esq.; of three parcels of land, called or known by the name or names of, &c., with all and singular their appurtenances, lying and being in the parishes of, &c., in the said county of &c., together with all and singular woods, underwoods and trees, growing or being in or upon the premises, or any part thereof, together also with the reversion and reversions of the premises aforesaid, and of every part and parcel thereof, together with all manner of commons, ways, estovers, profits, commodities, hereditaments and appurtenances to the

* Referred to in Page 368.

same premises belonging or appertaining. And afterwards, that is to say, on the day of, &c., he the said sheriff, by his deed bearing date, &c., under his hand and seal, did, in consideration of, &c., to him paid towards the satisfaction of the debt and judgment aforesaid, bargain, sell, assign and set over the said lease and term of years yet to come, of all and singular the said premises, unto one W. B. of London, Gent. Which said W. B. not long after did, in consideration of, &c., by your orator to him paid, bargain, sell, assign and set over unto your orator, all and singular the said premises, and every part thereof; upon which bargain, sale, and assignment of the said premises so made as aforesaid, your orator was in very good hopes to have peaceably and quietly entered into the said premises, and so to have held, occupied, and enjoyed the same accordingly. *But now* so it is, may it please your Lordship, that one T. R. of, &c., pretending to have a lease for divers years yet to come of some part of the said lands made unto him by the said G. L. long time before any such sale or assignment made thereof to your orator as aforesaid, hath and still doth keep your orator out of the possession of the said lands and premises; upon which lease or demise, he the said T. R. pretends a certain yearly rent is reserved to the said G. L. his executors or assigns; which rent (if any be) your orator hath heard is, &c., by the year, and which your orator, by reason of the lawful conveyance to him made as aforesaid, ought, both in reason and good conscience, to have and enjoy during such term as the said T. R. shall hold and occupy the land aforesaid, by reason of the said lease which he so pretendeth to have. But forasmuch as your orator

doth not certainly know whether the said T. R. has any such lease, or (if he hath any such lease) what date the same beareth, nor what term the said T. hath therein unexpired, nor what rent is thereby reserved, nor what covenants are therein contained; and also forasmuch as your orator cannot, by the strict rules of law enter into the premises, nor knoweth how, in due form of law to commence any action against the said T. R. either for the recovery of the said land, or the rent aforesaid. And for that the said T. R. doth not only use and occupy the said lands and premises to his own profit and advantage, without yielding or paying any rent therefore to your orator, or to any other person lawfully claiming the same, but doth also utterly refuse to shew his said lease, whereby he claimeth to hold the said lands aforesaid, either to your orator, or to any other person; and for that the said T. in combination and confederacy with, &c. (*as the usual clause of confederacy*). All which actings and doings of the said T. &c., are contrary to right equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator. In tender consideration whereof, and forasmuch as your orator is remediless, &c. (*as usual*) and for that your orator hath no ordinary way by the ordinary course of the common law to enforce the said T. R. to produce or shew to your orator such writings as he hath for the holding and occupying the lands aforesaid, but is altogether destitute of the means to have a sight of the same, but by the aid and assistance of this honourable court. To the end, therefore, that the said T. R. may be enforced upon his oath to discover what right he hath to the premises, or any part thereof, and what rent or rents he hath

paid for the same, and to whom; and that he may also set forth in his answer upon oath, a true copy or true copies of such lease or other writings *in hæc verba*, whereby he claimeth the premises aforesaid, or any part thereof; and that the said T. may truly and directly answer upon oath all the matters and things herein before contained, as fully and perfectly as if the same had been here again repeated and interrogated, and may particularly set forth upon oath, whether, &c. May it therefore please your lordship to grant, &c. process prayed, vers. T. R.

The Answer of T. R. Defendant, to the Bill of Complaint of W. B. Gent. Complainant.

The said defendant now, and at all times hereafter, saving, &c. saith, That the said G. L. named in the complainant's said bill, was possessed for divers years yet to come of the said parcels of land in the said bill mentioned, and called or known by the name of, &c. by virtue of a lease thereof, made by the said T. S. Esq. in the said bill also named, unto the said G. L. long before the supposed extent specified in the said bill of complaint. And the said G. L. so being thereof possessed long before the supposed extent (if any such there were) had in such manner, as in the said bill of complaint is supposed, made a lawful demise and lease of part of the said three parcels of land, containing fourteen acres, or thereabouts, unto the said defendant, for divers years yet to come; upon which lease the said G. L. reserved a yearly rent, to be paid during the continuation of the said lease: By force of which lease the defendant entered into the said fourteen acres, part of the said three parcels of land, and

was, and yet is lawfully possessed accordingly, and ever since hath, and yet doth enjoy the same, by virtue of the said lease and demise, and is thereby to have and enjoy the same during the continuance of the said years, of which there are at this time about sixty years to come and unexpired, and saith, That the complainant is a person altogether unknown to this defendant, being one he this defendant never had any dealings or correspondence with, and therefore this defendant cannot but wonder at this suit, commenced by the said complainant against this defendant, touching the premises. And this defendant saith, That the said G. L. after the said lease and demise so made to the said defendant, of the said fourteen acres of land as aforesaid, and before the said supposed extent, made a grant and assignment of the interest and term of the said G. L. as well of the fourteen acres, which the said defendant hath and occupieth by virtue of the said lease, for divers years thereof yet to come and undetermined; as also of the residue of the said three parcels of land mentioned in the said bill of complaint, unto H. L. son of the said G. L. unto which grant and assignment the said defendant was privy. And therefore this defendant humbly conceives, and is advised, That he this defendant is, for the payment of his rent, chargeable, and ought by the law to pay, the same rent so reserved, unto the said H. L. and not to the said complainant, which said R. this defendant doth verily think is the lawful landlord, during the said term for years yet to come, and not the said complainant, who is altogether a stranger to this defendant; and saith, That the said complainant never at any time heretofore demanded any rent for the said part of the lands that this defendant hath, and occupieth by

virtue of the said lease for years: And also saith, that he is sued by the said W. B. in the said bill of complaint named, in her Majesty's Court of Queen's Bench, in an action of debt, brought by him against the said defendant; and therefore the said defendant is somewhat surprised at this suit brought against him by the said complainant, touching the premises, whereby this defendant is wrongfully vexed, and sued without any just cause: *without that*, that there is any such extent made of the said three parcels of land, called, &c.; or that after the same extent there was any such bargain and sale made by the sheriff, of the said term and lease for years to the said W. B. as in the said bill is set forth, or that the said W. B. bargained or sold the premises to the complainant, or that the said complainant ought to have and enjoy the said premises to the knowledge of this defendant: And without that there is any other matter, cause, &c. (*as before*).

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THE END.

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